Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

Steven Smith,

Petitioner

v.

Consolidated Freightways, Inc.,

Respondents

On Petition for *Writ of Certiorari*
To the Supreme Court of Pennsylvania

Petition for *Writ of Certiorari*

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QUESTIONS PRESENTED

I. Whether the Pennsylvania courts lacked subject matter jurisdiction over Petitioner's claim when Respondent Employer filed an untimely Notice of Denial, in violation of federal and state regulations?

II. Whether the Pennsylvania state courts violated Petitioner's due process rights when the courts:

a) Failed to admit or consider relevant evidence;

b) Failed to act on Employer's withholding of reports essential to Petitioner's claim;

c) Failed to act on Petitioner's undisputed allegations that Respondent committed perjury by submitting false evidence;

d) Failed to entertain an appeal of Petitioner's claim.

III. Whether Pennsylvania state courts erred in failing to enforce an agreement between Respondent and the Department of Labor mandating OSHA compliance?

PARTIES

STEVEN SMITH,

Petitioner/Claimant,

a commercially licensed driver,

v.

CONSOLIDATED FREIGHTWAYS, INC.,

Respondent/Employer,

a self-insured common carrier.

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April 19, 2005 Order at 243 WAL 2005
Pennsylvania Supreme Court
Denying Reconsideration of its *Allocatur* Denial.

December 17, 2003 Order at 1828 CD 2003
Commonwealth Court of Pennsylvania
affirmed the Worker's Compensation Appeal Board

July 29, 2003 Order at A02-1087
Worker's Compensation Appeal Board affirmed
Worker's Compensation Judge Henry's
March 26, 2002 Order to Dismiss
2001 Petition alleging Respondent's 1996 perjury;
holding in favor of the non-responsive defenses of
res judicata and *collateral estoppel.*

December 29, 1999 Orders at A97-4661/A98-4922
Worker's Compensation Appeal Board affirmed
Worker's Compensation Judge Vallely's
October 15, 1997 Order to Dismiss Petition
Respondent's May 6, 1996 Notice of Denial
Petitioner's February 28, 1996 Date of Injury.
November 30, 1997 Order to Deny Reimbursement
of Petitioner's medical expenses.

JURISDICTIONAL STATEMENT

Order to be Reviewed

Smith v. WCAB (Consolidated Freightways), 1828 C.D. 2003 (Pa. Cmwlth. December 17, 2003)(unreported opinion), *en banc* review denied (Pa. Cmwlth. February 19, 2004), *Allocatur denied*, 243 WAL 2004 (Pa. Sup. Ct. March 23, 2005), *Reconsideration denied* 243 WAL 2004 (Pa. Sup. Ct. April 19, 2005).

Statutes Conferring Jurisdiction

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S.C.A. Const. Art. III § 2, cl. 2

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
28 U.S.C.A. § 1257(a)

STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, §1 ". . . .nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Hazard Communication Regulations. 29 C.F.R. 1910.1200. (Appendix).

Hazardous Materials Regulations, 49 C.F.R. 171-180. (As Amended 1996). See Appendix.

Pennsylvania Workers' Compensation Act, 77 Pa.Stat. §§ 774.1, 991 (Bisel 2005). (Appendix).

Interstate Transportation Statute, 75 Pa. Cons. Stat. Ann. § 8301 *et seq.* (Appendix).

STATEMENT OF THE CASE

February 28, 1996, Petitioner Steven Smith, a Commercially Licensed Driver, testified that Respondent knowingly unloaded and reloaded a damaged container of Chemrex .1.1.1 Tricloroethane, which contains Dioxane (CAS No. 123-91-1), onto its trailer, over the objection of a dock employee. This statement is confirmed by Respondent's shipping documents. The damaged held a Chemrex division 6.1 (PGIII) hazardous material (HM) that requires warning placards on the truck and MSDS information, which Respondent did not provide for its damaged shipment.

Respondent's employee of thirty years, Petitioner had no symptoms of respiratory injury prior to that accident. Petitioner filed a grievance with the union and an accident report with the employer, listing respiratory complaints.

March 1, 1996, Respondent reported the accident to the Department of Transportation. March 6, 1996, OSHA opened its investigation. Respondent did no hazmat testing or clean-up of the accident.

April 12, 1996, pursuant to settlement with OSHA, reducing fines and penalties, Respondent referred Petitioner to its panel medical providers.

May 6, 1996, Respondent filed its untimely Notice of Denial and contested payment of medicals. Paragraph 6 of the Denial, *other good cause*, stated: "The current information does not establish that your current condition was the result of your work activities on February 28, 2005."

May 12, 1996, Petitioner filed a Claim Petition stating in Paragraph 1: that he was: "*Exposed to an unknown leaking poison which caused shortness of breath, irritated throat, sour taste in mouth, toxic bronchitis, and lingering cough.*" In Paragraph 3

Petitioner stated: *"Company loaded three boxes of Tricholoroethane, of which one box was damaged,..."*

June 30, 1996, the Amended Pennsylvania's Worker's Compensation Act went into effect.

July 3, 1996, Respondent filed an untimely Answer, specifically denying all allegations, which is inconsistent with Respondent's bill of lading; its reports and admissions to the Departments of Transportation, Labor, and OSHA. Respondent's October 26, 1996 report, by a non-examining MD, contradicts Respondent's Answer and denials.

November 13, 1996, Respondent submitted its Second Hearing Exhibits, which selectively exclude Petitioner's April 12, 1996 "medical conclusions" from HAPPI, finding Petitioner unfit to return to work and releasing him to Dr. Frey, who referred Petitioner to Dr. Nellhaus, a pulmonary specialist. Respondent submitted Petitioner's May 28 and June 25, 1996 reports but not the September 1996 report from Dr. Nellhaus, Petitioner's treating pulmonary MD. The WCJ accepted Respondent's expert report as *testimony* despite Petitioner's hearsay objection.

February 25, 1997, Respondent's attorney submitted a letter but refused to appear for a hearing. The Workers' Compensation Judge (WCJ) accepted the letter as Respondent's Exhibit G. The WCJ failed to include Petitioner's correspondence after the hearings as Exhibits.

October 15, 1997 Order, WCJ acknowledged Petitioner's "exposure" to a poisonous chemical but dismissed the Claim Petition based on Respondent's expert report from a non-examining MD and holding that "burden of proof" was born by Petitioner. WCJ considered no Bureau Exhibits filed by the parties.

Errors in the WCJ Findings of Fact:

FF#1 erred on the date of injury and the identification of the specific chemical that caused the injury.

FF#6 that Petitioner: "... *treated at a local emergency room and later consulted several physicians.*" fails to attribute Petitioner's medical treatment to the panel providers or Respondent's OSHA settlement.

FF#10 materially misquoted the September 1996 report of Petitioner's treating pulmonary physician, Dr. Nellhaus, in finding no relationship between the chemical exposure and Petitioner's respiratory injury.

"I can say with a reasonable degree of medical certainty that the exposure of this chemical was temporally related to the onset of this patient's respiratory complaints. The exposure did subject the patient to a period of disability; I would not expect this disability to be permanent, however."

Dr. Nelhaus

FF#12 materially misquoted Respondent's expert, who relied upon "*absence of literature*" as opposed to finding Respondent's expert *"reviewed literature."* Further, the WCJ materially misquoted Respondent's expert by deleting the word "known" (i.e.) a hiatal hernia as purported source of Petitioner's symptoms.

FF#13 quoted and relied on a 12/18/96 medical report never admitted into evidence and not listed as an exhibit. Additionally, medical reports were given the same evidentiary weight as cross-examined expert testimony. Petitioner's Counsel registered a record hearsay objection to admission of the expert report, which Respondent never cured. The WCJ failed to incorporate Petitioner's hearsay objection when it relied upon the report in its October 15, 1997 Order.

Therefore, FF#14, 15, 16 were made contrary to or absent substantial evidence that the court relied on to support conclusions of law drawn to deny the claim.

November 30, 1996, WCJ Vallely denied Claimant's petition for reimbursement of medical expenses, including the HAPPI panel provider bills derived under the direction and control of Respondent. Petitioner relied upon the Veteran's Administration to help him pay medical expenses that Respondent refused to pay.

Errors in the WCJ Findings of Fact:

FF#2 that Respondent's Answer was timely and responsive is both a facial and material legal error in denying payment of benefits.

FF#3 that: Petitioner *".. had received no medical treatment between February 28, 1996, the date of exposure, and August 12, 1996 for any symptoms he believed were associated with the work-related chemical exposure."* is both a material error and facially contradictory to the October 15, 1997 Decision and the Exhibits relied upon.

FF#3 materially misquoted Respondent's expert by deleting the word *"known"* hiatal hernia, as causing Petitioner's complaints.

FF#4 & 5 fail to explicitly set forth why the court ruled out Petitioner's medical evidence. Therefore, the WCJ's findings of fact do not support the WCJ's conclusion of law or decision denying Petitioner's petition for payment of medical benefits.

December 29, 1999, the Workers' Compensation Appeal Board (WCAB) affirmed, stating it consolidated Claimant's appeals for the sake of judicial economy. The WCAB gave Respondent's expert report the weight of cross-examined testimony. The WCAB acknowledged Petitioner's October 31, 1997 Review Medical Petition but affirmed the November 30, 1997 Decision where the WCJ opined over medical evidence in place of Utilization Review, as enacted in the June 30, 1996 amended Act.

Petitioner filed a union benefits claim and the union paid medical expenses and wages from its health and welfare fund, but never enforced Petitioner's rights by investigating or granting Petitioner a grievance hearing.

The union's health and welfare fund is an ERISA plan and whose trustees, Joe Schmid, the union business agent, and Anthony Simoes, Respondent's management employee, may have acted in breach of their fiduciary duty.

Petitioner reasonably believes that Respondent's actions constitute witness retaliation against him, for 1992 reporting of illegal stickers on trucks and 1996 notifying OSHA about the chemical accident. The union plan pays Petitioner over $1,000 less each month in pension benefits, as he was forced to retire one year earl when the union failed to investigate and made no effort to enforce his rights

In 2001, pursuant to Petitioner's efforts, OSHA requested and Respondent produced the specific and material Chemrex MSDS scientific evidence and Petitioner's HAPPI medical records, including conclusions finding Petitioner unfit to return to work, which OSHA released to Petitioner.

September 2001, Petitioner filed a Claim, with the Pennsylvania department of labor, alleging that Respondent knowingly and fraudulently contested his

Claim for Benefits in 1996 and requested a hearing to admit evidence to support Petitioner's allegations of Respondent's fraud. Petitioner reasonably alleged that self-insured Respondent/employer made a bad faith contest by refusing to pay Petitioner's wages, medical bills and attorney fees under the Act.

The Department of Labor granted Petitioner a hearing before Judge Henry in November 7, 2001, to consider Petitioner's material and non-cumulative evidence. Respondent never respond to Petitioner's allegations of fraud. The Notice to attend the hearing expressly stated that failure to address the allegations raised in the petition are deemed admissions. The court failed to permit cross-examined testimony.

March 26, 2002, the WCJ entered an Order denying the claim petition in accord with his findings of fact, which contained material errors, as follows:

FF#1 relied on the wrong 1996 filing date;
FF#2 erred in finding Respondent timely and erred in finding Respondent responsive;
FF#3 relied on J Vallely's 1997 errors of fact;
FF# 4 & 5 drew legal inferences unsupported by substantive, admissible record evidence.

Judge Henry did not address Respondent's failure to respond to allegations of fraud, a deemed admission, and upheld Respondent's affirmative defenses, which are supported by judicial errors of fact and inadmissible hearsay, to deny Petitioner's claim.

July 29, 2003, the WCAB entered an Opinion and Order, which upheld Respondent's affirmative defenses and noted Petitioner's failure to Request a Section 426 Rehearing within eighteen (18) months.

November 24, 2003, the Commonwealth Court *sua sponte* reviewed Petitioner's Reply Brief and entered an Order striking it as untimely filed.

December 17, 2003 the Commonwealth Court of Pennsylvania entered an Order affirming the

Decision of the WCAB, accompanied by an unreported *Memorandum* Opinion.

February 19, 2004, having considered Petitioner's Application for Reconsideration before the court *en Banc* and Respondent's Answer, Reconsideration was denied.

March 9, 2004, the Commonwealth Court considered petitioner's request to report the opinion.

March 23, 2005, the Supreme Court of Pennsylvania denied *Allocatur* to review the Decisions of the Commonwealth Court and Petitioner filed a Petition for Reconsideration.

April 19, 2005, the Supreme Court of Pennsylvania entered an Order denying Reconsideration of its *Allocatur* denial.

Petitioner hereby appeals the orders entered in state court denying him disability benefits under the Workers Compensation Act and all applicable law, contracts and agreements.

SUMMARY OF THE ARGUMENT

The Pennsylvania Courts lacked jurisdiction to enter Decisions and Orders on Respondent's untimely Notice of Denial, as Petitioner's right to payment for medical treatment and disability benefits vested by operation of law in twenty days, after which time Pennsylvania courts were divested of subject matter jurisdiction over the workers' compensation claim.

The state courts failed to address Petitioner's allegations that Respondent perpetrated perjury and fraud on the court, to evade its liability for Petitioner's exposure, including medical treatment.

Respondent similarly attempted to evade its legal responsibility, challenged in a civil action, where the court chastised an arbiter "dispense[ing] his own brand of industrial justice" January 31,1979, at 78 cv 791 WDPA, by enforcing all applicable laws:

> "The provisions of the Vehicle Code, obviously designed and intended by the Pennsylvania Legislature to promote the safe and proper use of its highways, constitute the law and, of course, the public policy of Pennsylvania." J. Diamond

The courts here violated Petitioner's substantive right to due process by inequitable application of laws controlling this matter.

Selective enforcement of subject matter jurisdiction is an impermissible violation of the fourteenth amendment.

Courts here prejudiced Petitioner by failing to:

1) admit or consider relevant evidence;
2) act on Respondent's withholding of reports essential to Petitioner's claim;
3) act on Petitioner's undisputed allegations that Respondent committed perjury by submitting false evidence; and

4) entertain an appeal of Petitioner's claim.

Appellate courts failed to correct errors in the WCJ findings of fact, most notably October 15, 1997, where the WCJ misquoted Respondent's report, an "objected to" incorrect hearsay document referencing a version of the chemical inconsistent with its MSDS.

Petitioner's union failed its duty to seek enforcement of the rights and duties of the parties under contracts and agreements with Respondent, an apparent conflict of interest by trustees of the union's health and welfare ERISA plan, where Petitioner was unable to get a hearing before the grievance committee due to correspondence by Respondent's management employee trustee and the union's business agent trustee. The union's failure to investigate Petitioner's claim or to grant him a grievance hearing was fatal to Petitioner's claim. Self-insured Respondent and the union's ERISA plan realized economic benefit, at Petitioner's expense.

Respondent violated its settlement agreement, to comply with 29 CFR 1910.1200, federal regulation of exposure to toxic and hazardous substance, by refusing to pay for Petitioner's medical treatment.

Respondent, by refusing to treat Petitioner for chemical exposure and withholding MSDS information on a federally regulated "right to know" chemical, violated Petitioner's rights under:

1) the workers' compensation act,
2) state and federal transportation regulations,
3) the hazardous material "right to know" law,
4) its settlement agreement with OSHA,
5) its Union contract,
6) the Union Constitution,
7) Petitioner's employee ERISA benefits,
8) a court order in WDPA at 78 cv 791 H, enforcing National Master Freight Agreement.

The state courts prejudiced Petitioner by failing to enforce Respondent's agreement with OSHA.

ARGUMENT

The United States Supreme Court has appellate jurisdiction over cases originating in state courts. U.S. Const. Art. III, §2, cl. 2. In reviewing state court decisions, the Court may exercise plenary review over constitutional questions involving protected individual rights. Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984). The right to due process is one of these rights.

I. The Pennsylvania state courts lacked subject matter jurisdiction over Smith's case.

In order for a court to have subject matter jurisdiction over a case, required filings and responses must be timely or subject matter jurisdiction is divested. See Carlisle v. United States, 517 U.S. 416 (1996).

In the instant case, Respondent Consolidated Freightways filed an untimely notice of denial regarding Petitioner Steven Smith's original claim. Under the Pennsylvania Workers' Compensation Act, an employer must file a response within 20 days of the Petitioner's claim. Workers' Compensation Act, 77 P.S.A. §771. Although Smith filed his initial claim on May 12, 1996, Respondent Employer did not file its answer until July 3, 1996. This effectively divests the workers' compensation judge, and all subsequent courts, of subject matter jurisdiction.

II. The Pennsylvania state courts violated Smith's Fourteenth Amendment due process rights.

"[No state shall] deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV.

Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). Such rules "minimize substantively unfair or mistaken deprivations of" life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S., at 81, 92 S.Ct., at 1994.

A. The Pennsylvania state court violated Steven Smith's due process rights when it failed to consider relevant evidence.

October 15, 1997 Order, WCJ acknowledged Petitioner's "exposure" to a poisonous chemical but dismissed the Claim Petition based on Respondent's expert report from a non-examining MD and holding that "burden of proof" was born by Petitioner. WCJ considered no Bureau Exhibits filed by the parties.

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> Dr. Nelhaus

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FF#13 quoted and relied on a 12/18/96 medical report never admitted into evidence and not listed as an exhibit. Additionally, medical reports were given the same evidentiary weight as cross-examined expert testimony. Petitioner's Counsel registered a record hearsay objection to admission of the expert report, which Respondent never cured. The WCJ failed to incorporate Petitioner's hearsay objection when it relied upon the report in its October 15, 1997 Order.

Therefore, FF#14, 15, 16 were made contrary to or absent substantial evidence that the court relied

on to support conclusions of law drawn to deny the claim.

B. The Pennsylvania state court failed to act when Employer withheld reports material to Smith's case, in violation of Smith's due process rights.

C. The Pennsylvania state court violated Smith's due process rights when it failed to act on undisputed allegations that Employer perjured itself by submitting false evidence.

September 2001, Petitioner filed a Claim, with the Pennsylvania department of labor, alleging that Respondent knowingly and fraudulently contested his Claim for Benefits in 1996 and requested a hearing to admit evidence to support Petitioner's allegations of Respondent's fraud. Petitioner reasonably alleged that self-insured Respondent/employer made a bad faith contest by refusing to pay Petitioner's wages, medical bills and attorney fees under the Act.

The Department of Labor granted Petitioner a hearing before Judge Henry in November 7, 2001, to consider Petitioner's material and non-cumulative evidence. Respondent never respond to Petitioner's allegations of fraud. The Notice to attend the hearing expressly stated that failure to address the allegations raised in the petition are deemed admissions. The court failed to permit cross-examined testimony.

March 26, 2002, the WCJ entered an Order denying the claim petition in accord with his findings of fact, which contained material errors, as follows:

FF#1 relied on the wrong 1996 filing date;

FF#2 erred in finding Respondent timely and erred in finding Respondent responsive;

FF#3 relied on J Vallely's 1997 errors of fact; FF# 4 & 5 drew legal inferences unsupported by substantive, admissible record evidence. Judge Henry did not address Respondent's failure to respond to allegations of fraud, a deemed admission, and upheld Respondent's affirmative defenses, which are supported by judicial errors of fact and inadmissible hearsay, to deny Petitioner's claim.

July 29, 2003, the WCAB entered an Opinion and Order, which upheld Respondent's affirmative defenses and noted Petitioner's failure to Request a Section 426 Rehearing within eighteen (18) months.

D. The Pennsylvania state court violated Smith's due process rights when it failed to entertain an appeal of Smith's claim.

As the above illustrations have shown, Smith was denied due process at the initial stages of his workers' compensation proceedings. Appellate review may have corrected the denial of his due process rights and the errors made by the Workers' Compensation Court. However, the Pennsylvania Supreme Court declined to hear Smith's appeal, merely continuing the pattern of deprivation. (See Appendix at 24, 25).

III. The Pennsylvania state courts erred when they failed to enforce an agreement between Respondent and the Department of Labor mandating OSHA compliance.

Petitioner's union failed its duty to seek enforcement of the rights and duties of the parties under contracts and agreements with Respondent, an apparent conflict of interest by trustees of the union's health and welfare ERISA plan, where Petitioner was unable to get a hearing before the grievance committee due to correspondence by Respondent's

management employee trustee and the union's business agent trustee.

The union's failure to investigate Petitioner's claim or to grant him a grievance hearing was fatal to Petitioner's claim. Self-insured Respondent and the union's ERISA plan realized economic benefit, at Petitioner's expense.

Respondent violated its settlement agreement, to comply with 29 CFR 1910.1200, federal regulation of exposure to toxic and hazardous substance, by refusing to pay for Petitioner's medical treatment.

Respondent, by refusing to treat Petitioner for chemical exposure and withholding MSDS information on a federally regulated "right to know" chemical, violated Petitioner's rights under:

9) the workers' compensation act,
10) state and federal transportation regulations,
11) the hazardous material "right to know" law,
12) its settlement agreement with OSHA,
13) its Union contract,
14) the Union Constitution,
15) Petitioner's employee ERISA benefits,
16) a court order in WDPA at 78 cv 791 H, enforcing National Master Freight Agreement.

The state courts prejudiced Petitioner by failing to enforce Respondent's agreement with OSHA.

For the foregoing reasons, because this case involves deciding the scope of due process rights under the Fourteenth Amendment and because this case implicates the effect of government-private agreements as law, Petitioner requests that this Honorable Court grant a writ of Certiorari in the instant matter.

Respectfully submitted,

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APPENDIX

In The

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On Petition for *Writ of Certiorari*
To the Supreme Court of Pennsylvania

Appendix to Petition for *Writ of Certiorari*

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OPINIONS AND ORDERS BELOW

March 26, 2002

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workers' Compensation

Steven Smith, claimant
v. **No. 658011**
Consolidated Freightways

RECORD

The claimant, Steve Smith, filed an original claim petition with the Bureau on May 15, 1996. In his petition, the claimant alleged that on May 28, 1996, he was exposed to the chemical trichloroethane while unloading a trailer in the course of his duties as a truck driver. Consolidated Freightways, the defendant, filed a timely, responsive answer to this petition. Pursuant to a Decision and Order circulated on October 16, 1997, the claimant's prior claim petition was denied by workers' compensation Judge Kathleen Vallely. In that Decision and Order, Judge Vallely found that although the claimant had established that he was exposed to trichloroethane while in the course of his employment, he failed to meet his burden of proving that he sustained any injury or disability as a result of that exposure. This Decision and Order was affirmed by the Workers' Compensation Appeal Board in an order dated December 31, 1999.

The claimant filed a new claim petition which was received by the Bureau on September 27, 2001. In this new petition, the claimant again alleges that he sustained a work-related injury on February 28, 1996, while in the course of his employment with the defendant. The claimant again alleges an injury due to chemical exposure while employed as a truck driver. The defendant again filed a responsive answer, not only denying all the substantive allegations, but also arguing that the present claim petition is precluded based

upon the earlier determination of Judge Vallely.

At the hearing held in this matter in November 7, 2001, claimant's counsel argued that they should not be precluded from refiling this petition, as the defendant was guilty of fraud. This allegation is based on the claimant's contention that the defendant failed t turn over certain material data safety sheets for the chemicals to which the claimant was exposed while driving a truck while in their employment. Claimant argues that if they had this material, the outcome of the earlier proceeding would have clearly been different. The defendant again raised the issue of res judicata and collateral estoppel, and argued that this petition should be dismissed.

I find the arguments advanced by the claimant to be withheld from merit. Even if the defendant had the material data safety sheet in its possession at the time of the original proceeding, and failed to turn it over, I find this had no material consequent to the earlier proceeding. I note that in her decision, Judge Vallely found, in fact, that the claimant was exposed to the chemical trichloroethane. However, she further found that the medical evidence of record failed to establish the claimant suffered any injury or any disability as a result of this exposure. She based this finding on her determination that the opinions offered by the defendant's physician, Dr. Guzzardi were more credible than the opinions offered by the claimant's physician. In fact, she found the opinions offered by the claimant's physicians to be equivocal in linking any exposure to any disability that the claimant may have suffered. Dr. Guzzardi opined that claimant did not suffer any pulmonary problems as a result of his exposure, and in fact, his then current symptoms were caused by reflux due to his non work-related hiatal hernia. Therefore, the potential effects of the chemical to the claimant are immaterial. Not only that, as the claimant knew of the chemical to which he was exposed, knowledge of all its adverse effects were as readily available to him as to anyone else. He could have hired his own toxic expert to testify as to the effects of the chemical, but chose not to do

so. In addition, as Judge Vallely found that his symptoms were then related to a non-work-related condition, it does not matter what he was exposed to at work, or at least, what the material safety data sheets had to say of that chemical.

Based upon the above considerations, I found the allegations contained in the new petition to be no different than those addressed by Judge Vallely in her earlier determination. I found nothing in the evidence submitted by the claimant in support of this new petition that would warrant re-opening this matter to litigation. Therefore, the current petitions will be dismissed.

FINDINGS OF FACT

1. The claimant filed an earlier claim petition with the Bureau on November 15, 1996. In that petition, the claimant alleged that he was exposed to the chemical trichloroethane, causing a work-related injury, while in the course of his employment with the defendant.
2. The defendant filed a timely, responsive answer, denying the substantive allegations contained in the claimant's original claim petition.
3. Pursuant to a decision and order circulated on October 16, 1997, by Workers' Compensation Judge Kathleen Vallely, the claimant's earlier claim petition was denied. Judge Vallely found that although the claimant did meet his burden of proving that he was exposed to the chemical trichloroethane, he failed to establish any injury or disability as a result of that exposure. This determination was affirmed by the Workers' Compensation Appeal Board.
4. The claimant filed new claim petitions, which were received by the Bureau on September 27, 2001. In this new filing, the claimant alleges that he should now be able to proceed on his original Claim Petition, based upon an allegation that the defendant engaged in fraud in failing to turn over certain material safety data sheets to the claimant which were in the defendant's possession at the time of the original

litigation.

5. Taken as a whole, I find that the evidence of record fails to establish that this matter should be reopened for relitigation. I based this finding of the following considerations. In the earlier determination, it was found that the claimant was exposed to the chemical trichloroethane, but that he had failed to establish any injury or disability as a result of that exposure. This finding was based on the judge's earlier determination that the defendant's expert was more credible than the claimant's expert. That expert had found that the claimant, although he may have been exposed to this chemical, did not suffer any respiratory or pulmonary injury as a result of that problem. In addition, the doctor found that the claimant's condition was related to a non-work-related pre-existing hiatal hernia. Based on those determinations the earlier claim petition was denied.

   Even if the defendant had the MSDS in its possession, and failed to turn it over to the claimant, it would not have changed the outcome of the earlier proceedings. The judge already found that the claimant was exposed to that chemical, but found that there was no adverse effect as a result of that exposure. In fact, she relied upon the doctor's opinion that his symptoms were related to a non work-related condition. Therefore, there is no legitimate reason to reopen this matter.

CONCLUSIONS OF LAW

1. The issues raised by the claimant in his current filing are identical to those which were resolved in the prior determination made by Judge Vallely. Therefore, the claimant is precluded from relitigating those issues based on the doctrines or res judicata and collateral estoppel. Therefore, these petitions must be denied.

ORDER

AND NOW, this 15th day of March, 2002, the claim petitions filed by the claimant, and received by the Bureau on September 27, 2001, are hereby denied in accordance with the above findings of fact and conclusions of law.

/s/ David W. Henry, Workers' Compensation Judge

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workers' Compensation

Steven Smith, claimant
v.
Consolidated Freightways

HEARINGS: 7/25/96; record made
11/13/96; record made

CLAIMANT'S WITNESSES & EXHIBITS:
Steven Smith, claimant

1. Power of attorney
2. Records of Norman J. Frey, III, D.O.
3. 5/28/96 Report of Kurt M. Nellhaus, M.D.
4. Pulmonary function report
5. Correspondence of OSHA
6. 9/24/96 report of Kurt M. Nellhaus, M.D.
7. Bill of costs

EMPLOYER'S WITNESSES AND EXHIBITS:

1. 10/26/96 report of Lawrence J. Guzzardi, M.D.
2. 5/28/96 report of Kurt M. Nellhaus, M.D.
3. Medical office notes
4. Pulmonary function report
5. Radiology report
6. HAPPI Center records
7. 2/25/97 correspondence of Mr. Buggy

BUREAU EXHIBITS: None

FINDINGS OF FACT

1. The claimant, Steven Smith, filed a claim petition with the Bureau on May 15, 1996. The petition averred that on May 28, 1996, the claimant was exposed to the chemical "trichloroethane" while unloading a trailer in the course of his duties as a

truck driver. The accident report was completed by the claimant and given to the employer the next day. Total disability benefits were requested from April 12, 1996 to an indefinite period, but later amended to reflect a closed period to September 24, 1996. Payment of medical bills and counsel fees were also requested.

2. The employer, who is self-insured, filed a very detailed responsive answer, generally denying all critical averments of the petition. Several other affirmative defenses were raised, including that the alleged injury was not work-related.
3. The claimant appeared and testified at the initial hearing in this matter. He stated that he was 59 years of age, and had worked as a union truck driver/salesman for the employer, a common carrier. Claimant would ordinarily load and unload his truck and transport freight to various locations for defendant employer.
4. On February 28, 1996, the claimant reported to the employer's terminal according to his normal routine to pick up his truck and make his deliveries. The claimant made two deliveries when he noticed one of the three white cartons he was carrying was leaking. The claimant testified that the smell from this material burned his throat and caused him to become nauseated.
5. Claimant exited the trailer and contacted his employer because of his concerns over the toxicity of the material. He was instructed to secure the cartons, and return to the terminal. The claimant finished the rest of the work date. He returned to work the following week, and then took an extended overseas vacation.
6. Eventually, the claimant learned he was exposed to the chemical "trichloroethane." He asserted it was a hazardous material and was not aware he was carrying it on the date of his exposure. The claimant stopped working on April 23, 1996 because of his

shortness of breath and coughing. The claimant treated at a local emergency room and later consulted several physicians. As of the date of the first hearing, the claimant said that he takes medications, uses an inhaler, has a continuous sour taste in his mouth and cannot drink alcohol. Claimant received no medical treatment between February 28, 1996 and April 12, 1996 for symptoms he believes were associated with the work-related chemical exposure.

7. The claimant also testified on cross-examination that he had applied for a retirement pension in April of 1996. As of August 1, 1996, the claimant is currently collecting pension benefits in the amount of $2004.00 a month.
8. Since this is a claim for a closed period under 52 weeks, both parties offered reports of several physicians. Claimant offered two reports of Dr. Kurt M. Nellhaus, a pulmonary specialist, dated May 28, 1996, and September 24, 1996. Dr. Nellhaus reported that he first saw the claimant on May 28, 1996 by referral from Dr. Norman Frey. The claimant presented with the chief complaints of shortness of breath and a productive type cough.
9. Dr. Nellhaus noted on physical exam that the claimant had clear lungs, a normal heart and normal pulmonary function. Claimant treated with a course of corticosteroids. The September 24, 1996 report of Dr. Nellhaus stated that the claimant had additional complaints of nausea, vomiting and heartburn. Besides reiterating his prior report's physical findings. subsequent chest x-rays were read as normal, and an upper GI found the claimant to have a hiatal hernia. Dr. Nellhaus also performed a bronchoscopy on June 19, 1996 and opined the claimant had non-specific bronchitis without evidence of inhalation injury. As of September 16, 1996, Dr. Nellhaus opined the claimant was asymptomatic.
10. Dr. Nellhaus diagnosed the claimant as having a

reactive airway dysfunction, possibly precipitated by exposure to trichloroethane. He further opined that the claimant was subjected to a period of disability, but it was not permanent in nature.

11. The claimant also offered and April 4, 1996 report of OSHA addressed to the claimant in response to his formal complaint of chemical exposure. It states that the employer was cited for violation of OSHA regulations for failing to maintain chemical data sheets and failure to label items properly.
12. The employer offered the October 26, 1996 report of Dr. Lawrence J. Guzzardi, Board-certified in family practice, emergency medicine and toxicology. Dr. Guzzardi reviewed the claimant's records and the most current literature on the chemical trichloroethane. Dr. Guzzardi opined that the claimant's exposure to the chemical was transient, the chemical is common, and no known cases of exposure to trichloroethane causing pulmonary problems could be found. He also opined that the claimant had no objective evidence of injury following exposure and that his current complaints are caused by reflux due to his hiatal hernia.
13. The employer also offered a December 18, 1996 from Dr. George Schein. Dr. Schein reported that the claimant's nasal passages were normal, and a CT scan of his sinuses showed no chemical exposure damage. He also opined that claimant had no pathology showing chemical exposure.
14. After a thorough review of the testimony of the claimant, the circumstances during and after the trichloroethane exposure, and the medical reports offered, I find as fact that the claimant has not established through unequivocal medical evidence that he suffered a period of disability causally related to exposure to the chemical trichloroethane.
15. I specifically find that the reports of Dr. Nellhaus are equivocal. He distinctly noted a "possibility" of

airway dysfunction due to trichloroethane exposure. The claimant testified that he was exposed on February 28, 1996, but continued to work for several weeks. He then went on an extended overseas vacation, and did not cease working until April 12, 1996. This hiatus clearly supports the opinions of Drs. Guzzardi and Schein concluding that the claimant's exposure to the chemical was a minor irritant, lasting a few days. I further credit the opinions of Dr. Guzzardi as he is a toxicologist and reviewed the available literature on trichloroethane exposure and its consequences prior to offering an opinion.

16. I accept as credible the testimony of the claimant regarding his exposure and complaints. I further find as fact that the claimant was exposed to trichloroethane during his regular work duties. However, no injury or disability resulted from the exposure.
17. The claimant's counsel offered a bill of costs as follows:

Dr. Norman Frey – records	$25.00
Sargent's Court Reporting	121.55
Dr. Nellhaus – report	200.00
Sargent's Court Reporting	56.80
TOTAL	403.35

18. The claimant has a contingent fee agreement with his counsel in the amount of 20%, which is approved as reasonable.
19. A statement of wages was not submitted by the employer.
20. The employer's contest of this matter was reasonable.

CONCLUSIONS OF LAW

1. The claimant, Steven Smith, has failed to meet the burden of proof required to demonstrate that his claim petition for the closed period of April 12, 1996 to September 24, 1996 should be granted.

2. Unequivocal medical testimony is required to establish that the claimant incurred a disabling injury as a result of exposure to trichloroethane. Credible medical evidence combined with the testimony of the claimant establishes no causal connection of a disabling injury related to the claimant's employment.

ORDER

AND NOW, this 15th day of October, 1997, the claimant's claim petition is dismissed. No items in the bill of costs are payable. No attorney's fees are payable.

/s/ Kathleen Vallely, Workers' Compensation Judge

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workers' Compensation

Steven Smith, claimant
v.
Consolidated Freightways

HEARINGS: 12/10/97; record made
2/11/98; record made
8/26/98; record made

CLAIMANT'S WITNESSES & EXHIBITS:

1. Medical expenses
2. Hazardous substance fact sheets
3. MSDS on wood floor adhesive
4. Hazardous materials incident report
5. Grievance materials

EMPLOYER'S WITNESSES & EXHIBITS:
None

BUREAU EXHIBITS:
10/16/97 WCOD Decision and Order

FINDINGS OF FACT

1. Claimant, Steven Smith, through counsel, filed a petition for medical review. The claimant avers in his petition that by Decision circulated on October 16, 1997, I had found that claimant was exposed to a toxic substance. However, while there is a finding that no "disability" resulted from the exposure, there is no finding with regard to the medical bills claimant incurred as a result of this exposure. Claimant seeks a review of the Decision on the issue of payment of medical treatment.
2. Defendant employer, Consolidated Freightways, filed a timely responsive answer denying the material

allegations contained in claimant's petition.

3. In a Decision circulated on October 16, 1997, I found in finding of fact number 16 that the claimant was exposed to trichloroethane during his regular work duties. However, I found that no injury or disability resulted from that exposure. I further found that claimant had received no medical treatment between February 28, 1996, the date of his exposure, and August 12, 1996 for any symptoms he believed were associated with the work-related chemical exposure. I further found that the claimant's exposure to the chemical was transient and that there were no known cases of exposure to trichloroethane causing pulmonary problems. I also credited the opinion of Dr. Guzzardi that the claimant's complaints were caused to reflux due to hiatal hernia.
4. Claimant has not offered any evidence to support a finding that any treatment he received was related to his exposure to the chemical trichloroethane.
5. Claimant has not established that he has undergone any medical treatment that it causally related to the chemical exposure of February 28, 1996.

CONCLUSIONS OF LAW

1. Claimant has not met his burden of proof and established that he is entitled to reimbursement of any medical expenses.

ORDER

AND NOW, this 30th day of November, 1998, claimant's petition is denied.

/s/Kathleen Vallely, Workers' Compensation Judge

Commonwealth of Pennsylvania
Workers' Compensation Appeal Board

Steven Smith, claimant
v. **Nos. A97-4661/A98-4922**
Consolidated Freightways,
Defendant

OPINION

McDermott, Chairman:

Claimant appeals to the Workers' Compensation Appeal Board (Board) from the Decisions and Orders of Workers' Compensation Judge (WCJ) Kathleen Vallely, circulated on October 16, 1997, and November 30, 1998, denying Claimant's claim Petition and Review Medical Petition. We affirm for the reasons stated below.

On May 15, 1996, Steven Smith (Claimant) filed a Claim Petition alleging that on February 28, 1996, he was exposed to the chemical "trichloroethane" in the course and scope of his employment with Consolidated Freightways (Defendant). Claimant requested total disability benefits from April 12, 1996, for an indefinite period but later amended to request benefits from April 12, 1996, through September 24, 1996.

In a Decision and Order circulated on October 16, 1997, the WCJ denied Claimant's Claim Petition, concluding that he failed to meet his burden of proving a disabling injury as a result of exposure to a toxin and failed to establish a causal connection between a disabling injury and his work. Claimant's Appeal followed.

On October 31, 1997, Claimant filed a Review Medical Petition seeking to review the WCJ's October 16, 1997, Decision and Order. Claimant alleged that the WCJ failed to render a Finding as to whether Claimant was entitled to payment of medical bills incurred as a result of exposure to toxic substances. Defendant filed an Answer denying all material allegations and asserting that the WCJ's Decision

was being appealed and the Review Petition was not appropriately before the WCJ.

In a Decision and Order circulated on November 30, 1998, the WCJ denied Claimant's Review Petition concluding that he failed to sustain his burden of proving an entitlement to a reimbursement of medical expenses. Claimant's Appeal followed. We consolidate Claimant's Appeals for the sake of judicial economy.

The Board's scope of review is limited to determining whether an error of law has been committed and whether the necessary Findings of Fact are supported by substantial competent evidence. Universal Cyclops Steel Corporation v. WCAB and Krawczynski, 305 A.2d 757 (Pa. Cmwlth. 1973). Substantial competent evidence is such evidence that a reasonable mind would accept as adequate to support a Finding of Fact. York Terrace/Beverly Enterprises v. WCAB (Lucas), 591 A.2d 762 (Pa. Cmwlth. 1991).

Claimant argues that the WCJ erred in denying his Claim Petition. Specifically, Claimant asserts that the WCJ rendered Findings that he was exposed to a toxin and did not suffer any injury or disability, but failed to address medical treatments related to exposure.

The burden of proof in an original claim petition is on the claimant to prove a disability resulting from a work injury and that the injury continued to cause a disability throughout the pendency of the claim petition. Inglis House v. WCAB (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). If the cause of the condition is not obvious, unequivocal medical testimony is required. Cardyn v. WCAB (Heppenstall), 517 Pa. 98, 534 A.2d 1389 (1987).

Claimant testified that he was a driver/salesman for Defendant. On February 28, 1996, Claimant's load contained a hazardous material. After Claimant made two deliveries, he noticed that one of the hazardous material containers was leaking. The odor emanating from the leaking container caused his throat to burn and made him nauseous and light headed. He immediately left his trailer and contacted Frank Bazacheck, a manager, who told him to secure the material

and bring it back to the terminal. Claimant returned to the terminal and continued to work the remainder of the day without difficulty. Claimant did not contact a doctor or miss work for reasons related to this incident but continued to cough and feel ill. On April 12, 1996, Claimant went to the company doctor and has not returned to work since that date. Claimant elected to retire as of August, 1996. Claimant testified that he cannot return to work because he continues to suffer from shortness of breath. (N.T., 7/25/96, Pgs. 7, 17-27, 41-42; N.T., 11/13/96, Pgs. 8-9).

Claimant and Defendant presented the May 28, 1996, medical report from Kurt Nellhaus, M.D., F.C.C.P., which contains a diagnosis of possibly airway injury secondary to trichloroethane exposure and possible reactive airway disease related to the lung exposure. (Claimant's Exhibit 3; Defendant's Exhibit B).

Claimant also presented the September 24, 1996, medical report of Kurt Nellhaus, M.D., which reiterates the diagnosis of reactive airway dysfunction possibly triggered by trichloroethane exposure. The doctor opined that Claimant's exposure did cause Claimant a period of disability that was not permanent. (Claimant's Exhibit 6).

Claimant also submitted the April 4, 1996, OSHA report, which cited Defendant for failure to properly maintain chemical data sheets and labeling methods. (Claimant's Exhibit 5).

In opposition, Defendant presented the October 26, 1996, medical report of Lawrence Guzzardi, M.D., M.B.A. Dr. Guzzardi opined that Claimant's symptoms were not related to his transient exposure to trichloroethane. He noted that Claimant did not exhibit objective evidence of a pulmonary injury either at the time of exposure or at the time of his pulmonary evaluation. The doctor opined that Claimant's symptoms were the result of esophageal reflux from a non-work-related hernia. (Defendant's Exhibit A).

The WCJ found Claimant's testimony regarding his exposure and complaints credible, but rejected his testimony as it referred to any injury or period of disability. The WCJ

further found Dr. Guzzardi's report credible and rejected the reports of Dr. Nellhaus as equivocal. The WCJ, as the ultimate fact finder, has exclusive authority to determine the credibility of witnesses and to resolve conflicts in testimony. Vazquez v. WCAB (Masonite Corp.), 687 A.2d 66 (Pa. Cmwlth. 1996). Where, as here, that testimony provides substantial support for the WCJ's Finding, we may not alter that Finding on Appeal. Pennsylvania Turnpike Commission v. WCAB (Collins), 709 A.2d 460 (Pa. Cmwlth. 1998).

After a review of the record, we discern no error in the WCJ's conclusion that Claimant failed to establish a work-related injury or resulting disability. Dr. Guzzardi opined that Claimant's transient exposure to the toxin did not cause his symptoms or any period of disability. Thus, we discern no error in the WCJ's Decision to deny Claimant's Claim Petition. As the WCJ's Decision to deny Claimant's Claim Petition based upon a lack of a work injury, a subsequent disability, and a causal connection is supported by the evidence, there was no need for the WCJ to detail Claimant's medical treatments related to exposure. We discern no merit in Claimant's argument.

With respect to Claimant's Review Petition, Claimant argues that the WCJ capriciously disregarded evidence when she found that no injury or disability resulted from Claimant's exposure to trichloroethane, that Claimant did not receive medical treatment from February 28, 1996, through August 12, 1996, that Claimant's exposure was transient and there are no known cases of exposure to trichloroethane causing pulmonary problems, and that Claimant's complaints were caused by a hernia condition.

In a review medical petition, the issue is whether the medical treatment is causally related to the work injury, and not whether the medical treatment is reasonable or necessary. Mercy Douglas Corp. v. WCAB (Davis), 713 A.2d 722 (Pa. Cmwlth. 1998); Warminster Fiberglass v. WCAB (Jorge), 708 A.2d 517 (Pa. Cmwlth. 1998). The burden of proof is on the party filing the petition. Collier v. WCAB (Taylor Hospital), 719 A.2d 820 (Pa. Cmwlth. 1998). Capricious

disregard is the standard of review used when the party with the burden of proof is the only party to present evidence and that burdened party loses. Tomczak v. WCAB Pro-Aire Transport, Inc.), 667 A.2d 271 (Pa. Cmwlth. 1995). As Defendant did not present evidence, we shall apply the capricious disregard standard.

Claimant submitted copies of medical expenses and payment checks, a statement from the Commonwealth Department of Labor and Industry detailing methods of handling hazardous materials, a Material Safety Data Sheet which indicates that exposure to trichloroethane ay be harmful, an incident report, and information regarding his grievance process. (Exhibits 1-5). However, none of these documents establish a causal relationship between Claimant's exposure and his alleged work injury or symptoms. Furthermore, as we have affirmed the WCJ's Decision that Claimant did not sustain a work-related injury or resultant disability, we discern no error in the WCJ's Decision to deny Claimant's Review Petition.

With respect to the Review Petition, Claimant also argues that the WCJ did not render a reasoned Decision as required by Section 422(a) of the Act because she did not adequately state her reasons for discrediting competent evidence.

Section 422(a) of the Workers' Compensation Act[1] provides that all parties are entitled to a reasoned Decision with Findings of Fact and Conclusions of Law which clearly and concisely explain the WCJ's rationale. The WCJ must specify the evidence relied upon and state the reasons for accepting it. Uncontroverted evidence may not be rejected without a reason and must explain the rejection of such evidence. 77 P.S. Section 834; Hahnemann University Hospital v. WCAB (Wallace), 718 A.2d 391 (Pa. Cmwlth. 1998).

The WCJ analyzed Claimant's evidence and concluded that it was inadequate to meet his burden of proof.

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[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. Sections 1-1041.4; 2501-2626.

As we have affirmed the WCJ's Decision in this regard, the WCJ did not unreasonably reject the evidence and therefore the Decision falls within the mandates of Section 422(a). Claimant's argument is rejected.

Accordingly:

ORDER

The Appeals of Claimant are DENIED.

The Decisions and Orders of the Workers' Compensation Judge denying Claimant's Claim and Review Petitions are AFFIRMED.

BY THE BOARD: s/ Susan McDermott

Commonwealth of Pennsylvania
Department of Labor and Industry
Workers' Compensation Appeal Board

Steven Smith, claimant
v. **No: A02-1087**
Consolidated Freightways

OPINION

FRIONI, COMMISSIONER:

Before the Workers' Compensation Appeal Board is the Appeal of Steven Smith (Claimant) from the Decision and Order of Workers' Compensation Judge (WCJ) David Henry, denying Claimant's Claim Petitions based on res judicata/collateral estoppel. We affirm for the reasons stated below.

Claimant originally filed a Claim Petition on May 15, 1996, alleging that he sustained an injury during the course and scope of his employment with Consolidated Freightways (Defendant) on February 28, 1996, resulting from exposure to a harmful chemical identified as "trichloroethane." By a Decision circulated October 16, 1997, WCJ Vallely denied this Claim Petition.

Claimant then filed a Review Medical Petition seeking review of WCJ Vallely's Decision with regard to the payment for medical treatment. WCJ Vallely denied this Petition as well. Claimant appealed both of WCJ Vallely's Decisions to this Board. The Board affirmed both Decisions by an Opinion dated December 31, 1999.

On September 27, 2001, Claimant filed three new Claim Petitions, again alleging that he sustained a work-related injury caused by exposure to hazardous materials on February 28, 1996. Defendant moved for dismissal on the grounds of res judicata, collateral estoppel and statute of limitations. By a Decision and Order circulated on March 26, 2002, WCJ Henry denied Claimant's Claim Petitions, concluding that Claimant was precluded from re-litigating the same issues that were addressed in Claimant's previous

Claim Petition. Claimant's Appeal followed.

The Board's scope of review is limited to determining whether substantial, competent evidence supports the WCJ's findings of fact or whether an error of law was committed. Bethenergy Mines, Inc. v. WCAB (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). If the Board finds that the record contains evidence which a reasonable person might find sufficient to support the WCJ's findings of fact, the findings must be affirmed. Id. The WCJ has sole province over questions of credibility and may accept or reject the testimony of any witness, including a medical witness, in whole or in part. Hess Bros. v. WCAB (Gornick), 563 A.2d 236 (Pa. Cmwlth. 1989).

Claimant argues that the WCJ erred and abused his discretion in failing to consider after-discovered evidence in the form of a corrected Material Data Safety Sheet explaining the chemical make-up and hazardous classification of trichloroethane. In support of his Appeal, Claimant cites case law interpreting the Board's power to grant rehearing under Section 426 of the Workers' Compensation Act (Act), 77 P.S. Section 871.

Preliminarily, we observe that the WCJ adequately considered the after-discovered evidence submitted by Claimant. WCJ Henry stated in his findings that he reviewed the evidence as a whole but did not find the new evidence to have any weight in changing the outcome. WCJ Henry specifically stated that despite the additional material data safety sheet, he found it to be of no material consequence, since the sheet listed trichloroethane, and WCJ Vallely previously made a finding that Claimant was exposed to that chemical. In addition, WCJ Henry clearly found that the medical evidence regarding what specific chemical Claimant was exposed to was not relevant, given the fact that Claimant ultimately failed to prove a disability from chemical exposure. [Finding of Fact No. 5].

We must point out, however, this case does not include a Request for Rehearing under Section 426. Instead Claimant simply filed new Claim Petitions for the same

alleged injury that was the subject of his prior Claim Petition. Consequently, the WCJ dismissed those Petitions based on res judicata/collateral estoppel. Therefore, the proper inquiry in this Appeal is whether WCJ Henry correctly applied these doctrines in dismissing Claimant's latest Petitions.

We agree that Claimant's Petition is barred under the concept of res judicata. Res judicata applies when there is 1) identity of the thing sued upon or for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality and capacity of the parties suing or being sued. Mason v. WCAB (Hilti Fastening Systems Corp.), 657 A.2d 1020 (Pa. Cmwlth. 1995). Whether two actions are identical depends on whether the ultimate and controlling issues have been previously decided. Hammel v. Hammel, 636 A.2d 703 (Pa. Super. 1994).

Claimant is alleging the same date of injury and the same mechanism of injury, exposure to hazardous material, in his subsequent Claim Petitions as in his first Petition. Claimant is claiming the exact same symptoms and complaints and seeking the exact same type of benefits. In all the actions on this matter the parties have been the same. Consequently, we cannot agree with Claimant's argument that res judicata does not apply. Significantly, he advances no authority, and we are aware of none, that allows the WCJ or this Board to disregard a prior adverse adjudication.

Accordingly, we:

ORDER

The Decision and Order of the Workers' Compensation Judge denying Claimant's Claim Petition is hereby AFFIRMED. The Appeal of Claimant is Denied.

BY THE BOARD:
/s/ Alfonso Frioni

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

Steven Smith,
Petitioner

v. **No. 1828 C.D. 2003**

Worker's Compensation
Appeal Board (Consolidated Freightways),
Respondent

ORDER

NOW, March 9, 2004, upon consideration of petitioner's request to report the opinion accompanying our Order in the above-captioned matter, the request is denied.

BY THE COURT

/s/ James Gardner Colins, President Judge

ORDER TO BE REVIEWED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Smith,
Petitioner

v. **No. 1828 C.D. 2003**

Worker's Compensation Appeal Board (Consolidated Freightways,
Respondent

ORDER

AND NOW, this 17th day of December, 2003, the decision of the Workers' Compensation Appeal Board is AFFIRMED.

S/ Robert Simpson, Judge

MEMORANDUM OPINION

Steven Smith (Claimant), representing himself, appeals the decision of the Workers' Compensation Appeal Board (Board) that determined his second claim petition was barred by res judicata and collateral estoppel. As Claimant's earlier identical claim petition was denied, we agree he cannot re-litigate the matter, and we affirm.

Claimant was employed by Consolidated Freightways (Employer) as a truck driver. In February 1996, he was exposed to trichloroethane. Following exposure, Claimant claimed shortness of breath, bronchitis, cough, and throat irritation.

Claimant filed a claim petition averring total disability with an onset date of April 12, 1996. Claimant and Employer presented conflicting expert reports on causation. The WCJ accepted Employer's experts over Claimant's expert, finding:

> 14. After a thorough review of the testimony of the claimant, the circumstances during and after the

trichloroethane exposure, and the medical reports offered, I find as fact that the claimant has not established through unequivocal medical evidence that he suffered a period of disability causally related to exposure to the chemical trichloroethane.

15. I specifically find that the reports of Dr. Nellhaus are equivocal. He distinctly noted a "possibility" of airway dysfunction due to trichloroethane exposure. The claimant testified that he was exposed on February 28, 1996, but continued to work for several weeks. He then went on an extended overseas vacation, and did not cease working until April 12, 1996. This hiatus clearly supports the opinions of Drs. Guzzardi and Schein concluding that the claimant's exposure to the chemical was a minor irritant, lasting a few days. I further credit the opinions of [Employer's toxicologist] as he is a toxicologist and reviewed the available literature on trichloroethane exposure and its consequences prior to offering an opinion.

16. I accept as credible the testimony of the claimant regarding his exposure and complaints. I further find as fact that the claimant was exposed to trichloroethane during his regular work duties. However, no injury or disability resulted from the exposure.

October 15, 1997 WCJ Op. at 3 (emphasis added). Claimant appealed to the Board which, finding the WCJ's decision supported by substantial evidence, affirmed.

In September 2001, Claimant filed a second claim petition again alleging that exposure to trichloroethane in February 1996 caused indefinite disability with an onset date of April 12, 1996. Employer raised the defenses of res judicata, collateral estoppel, and statute of limitations.

Claimant argued his claim was not barred because Employer defrauded him by failing to turn over a material data safety sheet (MSDS) for the chemicals to which he was exposed at work. The WCJ rejected Claimant's argument, finding that:

> Even if [Employer] had the MSDS in its possession, and failed to turn it over to the claimant, it would not have changed the outcome of the earlier proceedings. The judge already found that the claimant was exposed to that chemical, but found that there was no adverse effect as a result of that exposure. In fact, she relied upon the doctor's opinion that his symptoms were related to a non work-related condition. Therefore, there is no legitimate reason to reopen this matter.

March 15, 2002 WCJ Op. at 3; Finding of Fact (F.F.) No. 5. Agreeing Claimant's peition was barred by res judicata and collateral estoppel, the Board affirmed.

Claimant now petitions this Court for review of the Board's order arguing Employer defrauded him and the original WCJ by not providing the MSDS documents in a timely manner. Claimant asserts this document discloses information pertaining to the exact nature of the chemicals to which he was exposed, and he requests a rehearing on causation.

The doctrine of *res judicata* provides that where there is a final judgment on the merits, future litigation between the parties on the same cause of action is prohibited. Myers v. Workers Compensation Appeal Board (Univ. of Pennsylvania), 7782 A.2d 1108 (Pa. Cmwlth. 2001), appeal denied, 568 Pa. 688, 796 A.2d 319 (2002). *Res judicata* encompasses two related, yet distinct priciples: technical *res judicata*, or claim preclusion, and collateral estoppel, or issue preclusion. Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.), 776 A.2d 362, 365 (Pa. Cmwlth. 2001).

"Technical res judicata provides that when a final

judgment on the merits exists, a future suit between the parties on the same cause of action is precluded." Id. Technical res judicata applies when the following four identities are present: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. Id. Res judicata applies to claims that were actally litigated as well as those matters that should have been litigated. Id. Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings. Id.

The doctrine of collateral estoppel/ issue preclusion prevents the re-litigation of issues of law or fact in a subsequent action when the following factors are demonstrated:

> (1) the issue decided in the prior case is identical to the one presented in the later case;
> (2) there was a final judgment on the merits;
> (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue and;
> (4) the determination in the prior proceeding was essential to the final judgment.

C.D.G., Inc. v. W.C.A.B. (McAllister), 702 A.2d 873, 875 (Pa. Cmwlth. 1997)(footnote omitted).

The four identities necessary for the application of technical res judicata/claim preclusion are present. Claimant's second claim petition was materially identical to his first. It sought benefits beginning on April 12, 1996. Also, it sought the same remedy, under the same theory, against the same parties.

Further, the four requirements of collateral estoppel/issue preclusion are met. The issues presented, and

the claim of disability beginning April 12, 1996 caused by exposure to trichloroethane, are identical. The claim petition resulted in a final judgment, and Claimant was a party provided a full and fair opportunity to litigate the issue.

Claimant asserts relitigation of the claim petition is warranted because Employer failed to provide him the MSDS during the first litigation. In support, he cites General Woodcraft & Foundry v. Workmen's Comp. Appeal Bd., 318 A.2d 385 (Pa. Cmwlth. 1974). General Woodcraft & Foundry addressed the applicability of Section 426 of Workmen's Compensation Act. Finding Board discretion to order a reargument, this Court stated, "Certainly it would be appropriate to grant a rehearing where additional evidence can be produced or where a party had not been given an opportunity to present his case." General Woodcraft & Foundry, 318 A.2d at 387.

General Woodcraft & Foundry is inapposite. It addressed situations in which a rehearing is appropriate pursuant to Section 426. Claimant did not and, due to the passage of time, could not petition for a rehearing under that section; rather, he filed a new claim petition four years after his original petition was denied. Further, "[t]he purpose of granting rehearing in workmen's compensation cases is to allow a party to present newly-discovered, noncumulative evidence, and will not be granted to permit the party to strengthen weak proofs already presented." Paxos v. Workmen's Comp. Appeal Bd. (Frankford-Quaker Grocery), 631 A.2d 826, 831 (Pa. Cmwlth. 1993)(emphasis added).

Denial of the original claim petition was premised on the rejection of Claimant's equivocal expert testimony and Claimant's conduct after exposure. Any error stemming from Employer's alleged failure to provide the MSDS was harmless. That document offers information regarding the nature of the chemical to which claimant was exposed. The document does not render Claimant's expert less equivocal and does not offer new information on Claimant's conduct after exposure.

As he was provided a full and fair opportunity to

litigate causation, Claimant's second petition was barred by res judicata and collateral estoppel. Accordingly, the Board's order is **affirmed**.

/s/ Robert Simpson, Judge

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Steven Smith,
Petitioner

v. **No. 243 WAL 2004**

Worker's Compensation
Appeal Board (Consolidated Freightways),
Respondent

ORDER

PER CURIAM

AND NOW, this 23rd day of March, 2005, the Petition for Allowance of Appeal is hereby Denied.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Steven Smith,
Petitioner

v. **No. 243 WAL 2004**

Worker's Compensation
Appeal Board (Consolidated Freightways),
Respondent

ORDER

PER CURIAM

AND NOW, this 19th day of April, 2005, the Application for Reconsideration is hereby denied.

STATUTORY PROVISIONS

Hazard Communication, 29 C.F.R. 1910.1200:

1910.1200(b)(4)(ii)

Employers shall maintain copies of any material safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet as soon as possible for sealed containers of hazardous chemicals received without a material safety data sheet if an employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

1910.1200(f) "Labels and other forms of warning."

(1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i)Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

[...](3) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) and regulations issued under that Act by the Department of Transportation.

1910.1200(g) "Material safety data sheets."

(1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in

the workplace for each hazardous chemical which they use.

49 C.F.R. 171.1, Applicability of Hazardous Materials Regulations (HMR) to persons and functions.

Sec. 171.1 Purpose and scope.

This subchapter prescribes the requirements of the Department of Transportation governing:

(a) The transportation of hazardous materials in commerce by, and their offering to: [. . . .]

(2) Interstate and foreign carriers by motor vehicle; and

(3) Intrastate carriers by motor vehicle so far as this subchapter relates to:

(i) Hazardous waste.

(ii) Hazardous substances.

[. . ..]

(c) Any person who, under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government, transports, or causes to be transported or shipped, a hazardous material or manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person as qualified for use in the transportation of hazardous materials shall be subject to and comply with all provisions of the Federal hazardous material transportation law, all orders and regulations issued thereunder, and all other substantive and procedural requirements of Federal, State, and local governments and Indian tribes (except any such requirements that have been preempted by the Federal hazardous material transportation law or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

(d) The use of terms and symbols prescribed in this subchapter for the marking, labeling, placarding and description of hazardous materials and packagings used in

their transport.

[Amdt. 171-53, 45 FR 34586, May 22, 1980, as amended by Amdt. 171-74, 48 FR 27690, June 16, 1983; Amdt. 171-78, 49 FR 10510, Mar. 20, 1984; Amdt. 171-12, 56 FR 8624, Feb. 28, 1991; Amdt. 171-116, 57 FR 52934, Nov. 5, 1992; Amdt. 171-119, 58 FR 6870, Feb. 2, 1993; Amdt. 171-2, 59 FR 49132, Sept. 26, 1994; Amdt. 171-141, 61 FR 21101, May 9, 1996]

Sec. 171.2: General requirements.

(a) No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

(b) No person may transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is handled and transported in accordance with applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

[. . . .]

(e) When a person performs a function covered by or having an effect on a specification prescribed in part 178, 179 or 180 of this subchapter, an approval issued under this subchapter, or an exemption issued under subpart B of this chapter, that person must perform the function in accordance with that specification, approval, or exemption, as appropriate.

(f) No person shall, by marking or otherwise, represent that--

(1) A container or package for the transportation of hazardous materials is safe, certified, or in compliance with the requirements of this title unless it meets the requirements of all applicable regulations issued under the Federal hazardous material transportation law . . .

[Amdt. 171-70, 48 FR 2655, Jan. 20, 1983, as amended by Amdt. No. 171-100, 54 FR 25004, June 12, 1989; Amdt. 171-12, 56 FR 8624, Feb. 28, 1991; Amdt. No. 171-115, 57 FR 30631, July 9, 1992; 57 FR 37902, Aug. 21, 1992; Amdt. No. 171-120, 58 FR 33305, June 16, 1993; Amdt. 171-2, 59 FR 49132, Sept. 26, 1994; Amdt. 171-141, 61 FR 21101, May 9, 1996]

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Sec. 171.16 Detailed hazardous materials incident reports.

(a) Each carrier who transports hazardous materials shall report in writing, in duplicate, on DOT Form F 5800.1 (Rev. 6/89) to the Department within 30 days of the date of discovery, each incident that occurs during the course of transportation (including loading, unloading, and temporary storage) in which any of the circumstances set forth in Sec. 171.15(a) occurs or there has been an unintentional release of hazardous materials from a package (including a tank) or any quantity of hazardous waste has been discharged during transportation. If a report pertains to a hazardous waste discharge:

(1) A copy of the hazardous waste manifest for the waste must be attached to the report; and

(2) An estimate of the quantity of the waste removed from the scene, the name and address of the facility to which it was taken, and the manner of disposition of any removed waste must be entered in Section IX of the report form (Form F 5800.1) (Rev. 6/89).

(b) Each carrier making a report under this section shall

send the report to the Information Systems Manager, DHM-63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590-0001; and, for incidents involving transportation by aircraft, a copy of the report shall also be sent to the FAA Civil Aviation Security Office nearest the location of the incident. A copy of the report shall be retained for a period of two years, at the carrier's principal place of business, or at other places as authorized and approved in writing by an agency of the Department of Transportation.

(c) Except as provided in paragraph (d) of this section, the requirements of paragraph (a) of this section do not apply to incidents involving the unintentional release of a hazardous material--

(1) Transported under one of the following proper shipping names:

(i) Consumer commodity.

(ii) Battery, electric storage, wet, filled with acid or alkali.

(iii) Paint and paint related material when shipped in a packaging of five gallons or less.

(3) Prepared and transported as a limited quantity shipment in accordance with this subchapter.

(d) The exceptions to incident reporting provided in paragraph (c) of this section do not apply to:

(1) Incidents required to be reported under Sec. 171.15(a);

(2) Incidents involving transportation aboard aircraft;

(3) Except for consumer commodities, materials in Packing Group I; or

(4) Incidents involving the transportation of hazardous waste.

Note: A guideline document for assisting in the completion of DOT Form F 5800.1 (Rev. 6/89) may be obtained from the Office of Hazardous Materials Transportation, DHM-51, U.S. Department of Transportation, Washington, DC 20590-0001.

[Amdt. 171-7, 35 FR 16837, Oct. 3, 1970, as amended by

Amdt. 171-56, 45 FR 73683, Nov. 6, 1980; Amdt. No. 171-65, 47 FR 24584, June 7, 1982; Amdt. 171-72, 48 FR 17095, Apr. 21, 1983; Amdt. 171-101, 54 FR 25813, June 19, 1989; Amdt. 171-109, 55 FR 39978, Oct. 1, 1990; Amdt. 171-140, 61 FR 18932, Apr. 29, 1996; Amdt. 171-145, 61 FR 27172, May 30, 1996]Sec. 171.17 [Reserved]

Sec. 171.21 Assistance in investigations and special studies.

(a) A carrier who is responsible for reporting an incident under the provisions of Sec. 171.16 shall make all records and information pertaining to the incident available to an authorized representative or special agent of the Department of Transportation upon request. The carrier shall give an authorized representative or special agent of the Department of Transportation reasonable assistance in the investigation of the incident.

(b) If the Department of Transportation makes an inquiry to a carrier of hazardous materials in connection with a study of incidents, the carrier shall--

(1) Respond to the inquiry within 30 days after its receipt or within such other time as the inquiry may specify; and

(2) Provide full, true, and correct answers to any questions included in the inquiry.

Pennsylvania Workers' Compensation Act Sections 414-419, 423, 435. 77 P.S. ____ (Bisel 2005).

77 P.S. Sec. 775 (Bisel 2005).

Whenever a claim petition or other petition is presented to the department, the department shall, by general rules or

special order, assign it to a referee for hearing. The department shall serve upon each adverse party a copy of the petition, together with a notice that such petition will be heard by the referee to whom it has been assigned (giving his name and address) as the case may be, and shall mail the original petition to such referee, together with copies of the notices served upon the adverse parties.

77 P.S. Sec. 851 (Bisel 2005).

At any time before an award or disallowance of compensation or order has been made by a referee to whom a petition has been assigned, the department may order such petition heard before any other referee. Unless the department shall otherwise order, the testimony taken before the original referee shall be considered as though taken before the substituted referee.

77 P.S. Sec. 821 (Bisel 2005).

Within twenty days after a copy of any claim petition or other petition has been served upon an adverse party, he may file with the department or its workers' compensation judge an answer in the form prescribed by the department. Every fact alleged in a claim petition not specifically denied by an answer so filed by any adverse party shall be deemed to be admitted by him. But the failure of any party or of all of them to deny a fact alleged in any other petition shall not preclude the workers' compensation judge before whom the petition is heard from requiring, of his own motion, proof of such fact. If a party fails to file an answer and/or fails to appear in person or by counsel at the hearing without adequate excuse, the workers' compensation judge hearing the petition shall decide the matter on the basis of the petition and evidence presented.

77 P.S. Sec. 802 (Bisel 2005).

Within fifteen days after notice that a petition has been directed to be heard by a referee has been served upon the adverse parties thereof, the referee shall fix a time and place for hearing the petition. The referee shall as soon as practicable within the limitations prescribed herein fix a time and a place for hearing the petition and serve upon all parties in interest a notice of the time and place of hearing, and shall serve upon the petitioner a copy of any answer of any adverse party. The hearing on any such petition shall be held within thirty-five days of the filing of the petition.

77 P.S. Sec. 833 (Bisel 2005).

The referee to whom a petition is assigned for hearing, may subpoena witnesses, order the production of books and other writings, and hear evidence, shall make a record of hearings, and shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the petition and answers and the evidence produced before him and the provisions of this act shall, in his judgment, require. The findings of fact made by a referee to whom a petition has been assigned or any question of fact has been referred under the provisions of section four hundred and nineteen shall be final, unless an appeal is taken as provided in this act.

77 P.S. Sec. 852 (Bisel 2005).

The board may remand any case involving any question of fact arising under any appeal to a referee to hear evidence and report to the board the testimony taken before him or such testimony and findings of fact thereon as the board may order. The department may refer any question of fact arising out of any petition assigned to a referee, to any other referee to hear evidence, and report the testimony so taken thereon to

the original referee.

77 P.S. Sec. 834-836 (Bisel 2005).

(a) Neither the board nor any of its members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same. All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.
(b) If any party or witness resides outside of the Commonwealth, or through illness or other cause is unable to testify before the board or a workers' compensation judge, his or her testimony or deposition may be taken, within or without this Commonwealth, in such manner and in such form as the department may, by special order or general rule, prescribe. The records kept by a hospital of the medical or surgical treatment given to an employe in such hospital shall be admissible as evidence of the medical and surgical matters stated therein.
(c) Where any claim for compensation at issue before a workers' compensation judge involves fifty-two weeks or less of disability, either the employe or the employer may

submit a certificate by any health care provider as to the history, examination, treatment, diagnosis, cause of the condition and extent of disability, if any, sworn reports by other witnesses as to any other facts and such statements shall be admissible as evidence of medical and surgical or other matters therein stated and findings of fact may be based upon such certificates or such reports. Where any claim for compensation at issue before a workers' compensation judge exceeds fifty-two weeks of disability, a medical report shall be admissible as evidence unless the party that the report is offered against objects to its admission.
(d) Where an employer shall have furnished surgical and medical services or hospitalization in accordance with the provisions of section 306(f.1), or where the employe has himself procured them, the employer or employe shall, upon request, in any pending proceeding, be furnished with, or have made available, a true and complete record of the medical and surgical services and hospital treatment, including X rays, laboratory tests, and all other medical and surgical data in the possession or under the control of the party requested to furnish or make available such data.
(e) The department may adopt rules and regulations governing the conduct of all hearings held pursuant to any provisions of this act, and hearings shall be conducted in accordance therewith, and in such manner as best to ascertain the substantial rights of the parties.

77 P.S. Sec. 853 (Bisel 2005).

(a) Any party in interest may, within twenty days after notice of a workers' compensation judge adjudication shall have been served upon him, take an appeal to the board on the ground: (1) that the adjudication is not in conformity with the terms of this act, or that the workers' compensation judge committed any other error of law; (2) that the findings of fact and adjudication was unwarranted by sufficient, competent evidence or was procured by fraud, coercion, or other improper conduct of any party in interest. The board may,

upon cause shown, extend the time provided in this article for taking such appeal or for the filing of an answer or other pleading.

77 P.S. Sec. 991 (Bisel 2005).

(a) The department shall establish and promulgate rules and regulations consistent with this act, which are reasonably calculated to:
(i) expedite the reporting and processing injury cases,
(ii) insure full payment of compensation when due,
(iii) expedite the hearing and determination of claims for compensation and petitions filed with the department under this act,
(iv) provide the disabled employe or his dependents with timely notice and information of his or their rights under this act,
(v) explain and enforce the provisions of this act.

(b) If it appears that there has not been compliance with this act or rules and regulations promulgated thereunder the department may, on its own motion give notice to any persons involved in such apparent noncompliance and schedule a hearing for the purpose of determining whether there has been compliance. The notice of hearing shall contain a statement of the matter to be considered.

(c) The board shall establish rules of procedure, consistent with this act, which are reasonably calculated to expedite the hearing and determination of appeals to the board and to insure full payment of compensation when due.

(d) The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rules of procedure:

(i) Employers and insurers may be penalized a sum

not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

(ii) Any penalty or interest provided for anywhere in this act shall not be considered as compensation for the purposes of any limitation on the total amount of compensation payable which is set forth in this act.

(iii) Claimants shall forfeit any interest that would normally be payable to them with respect to any period of unexcused delay which they have caused.

(e) The department shall furnish to persons adversely affected by occupational disease appropriate counseling services, vocational rehabilitation services, and other supportive services designed to promote employability to the extent that such services are available and practical.

75 Pa. Cons. Stat. Ann. Section 8301-8308:

§ 8301. Legislative findings.

(a) Essential nature.--It is hereby found as a fact that hazardous materials are essential for various industrial, commercial and other purposes, that their transportation is a necessary incident of their use and, therefore, that such transportation is required for the employment and economic prosperity of the people. It is also found as a fact that the transportation of hazardous materials may involve risk of injury to persons and damage to property and that the degree of the risk can and should be kept at a minimum consistent

with technical feasibility and economic reasonableness.
(b) Balance of interests.--The purpose of this chapter and the primary standard by which it shall be administered is to so regulate the transportation of hazardous materials and assure compliance with the regulations promulgated pursuant to this chapter that there is established and maintained a reasonable balance between the interests of the people in the safety of themselves and their property, on the one hand, and the interests of the people and their employment and economic prosperity on the other.

§ 8302. Powers and duties of department.

The department shall have the following powers and duties:

1. Administer the hazardous materials transportation program pursuant to this chapter.
2. Classify hazardous materials according to the nature and degree of risk involved in their transportation and apply separate regulations to each class.
3. Adopt regulations pertaining to methods of packing, loading and unloading hazardous materials; to the specifications, marking, inspection, condition and equipment of vehicles transporting such substances; to qualification of drivers and other matters relating to operation of such vehicles; to routing and parking of such vehicles, except that such regulations may not supersede ordinances of local authorities and all other factors which affect the nature or degree of risk involved in transportation of hazardous materials.
4. Declare any material to be a hazardous material and thereby subject its transportation to this chapter.
5. Issue permits and specify the terms and conditions thereof, exempting cargo tanks used solely for intrastate transportation and trucks used solely for the transportation of combustible liquids from Federal design specifications. The permits shall be issued upon meeting testing requirements established by department regulation and shall be valid for a period

of two years.

6. Inspect vehicles and investigate all other matters relating to the safe transportation of hazardous materials on any highway in this Commonwealth including the Pennsylvania Turnpike.
7. Delegate enforcement of all or parts of these regulations to one or more of the several departments and commissions represented on the Hazardous Materials Transportation Advisory Committee who meet training criteria specified by department regulation. Delegation shall be accomplished through cooperative agreements and become effective upon publication in the Pennsylvania Bulletin.
8. Enter into cooperative agreements with the Federal Government relating to the regulation of the highway transportation of hazardous materials.

§ 8303. Correspondence with Federal regulations.

In the case of any person who is subject to Federal regulations pertaining to the transportation of hazardous materials, the department's regulations shall, and in any other case may, as far as practicable, correspond with such Federal regulations. It is the purpose of this section to avoid, as far as practicable, the imposition of conflicting regulations upon persons who operate vehicles subject to Federal regulations, pertaining to the transportation of hazardous materials. It is also the purpose of this section to empower, but not require, the department to prescribe, for persons not subject to the Federal regulations, regulations identical with or similar to those Federal regulations pertaining to the transportation of hazardous materials.

§ 8304. Right of entry.

Every motor carrier shall allow any department field investigator, member of the Pennsylvania State Police or other person delegated enforcement authority in accordance

with section 8302(7) (relating to powers and duties of department) to enter upon and inspect the business premises of the motor carrier, including vehicles and other equipment located thereon, at all reasonable times for the purpose of determining whether the motor carrier is in compliance with this chapter and pertinent regulations, and shall make available to such person for inspection and copying all accounts, books, records, memoranda, correspondence and other documents which may reasonably relate to such determination.

§ 8305. Injunctions and other remedies.

(a) Restraining orders.--The Attorney General, upon request of the department or upon his own motion, may proceed in the name of the Commonwealth, by injunction, mandamus, quo warranto or other appropriate remedy at law or in equity, criminal or civil, to restrain violations of the department's hazardous materials regulations or orders or to enforce obedience thereto.

(b) Long arm provision.--Whenever the Attorney General shall have reason to believe that a person has violated any regulation or order of the department but is outside the jurisdiction of this Commonwealth, the Attorney General may petition the court for an order authorizing the seizure and confiscation of such person's vehicles or hazardous materials wherever and whenever they may be found in this Commonwealth.

§ 8306. Penalties.

(a) Offenses defined.--Any person who violates any provision of this chapter, any rule or regulation of the department, any order of the department or any condition of any permit issued pursuant to this chapter commits a summary offense and, upon conviction, the person shall be subject to a fine of not less than $50 nor more than $1,000 for each separate offense, and, in default of the payment of the

fine, shall be imprisoned for a period of 90 days.
(b) Willful violations.--Any person who willfully violates any provision of this chapter, any rule or regulation of the department, any order of the department or any condition of any permit issued pursuant to this chapter commits a misdemeanor of the third degree and, upon conviction, shall be subject to a fine of not less than $1,000 nor more than $25,000 for each separate offense or to imprisonment in the county jail for a period of not more than one year, or both.
(c) Subsequent willful violations.--Any person who, after a conviction of a misdemeanor for any violation within two years as provided in this section, willfully violates any provision of this chapter, any rule or regulation of the department, any order of the department or any condition of any permit issued pursuant to this chapter commits a misdemeanor of the second degree and, upon conviction, shall be subject to a fine of not less than $2,500 nor more than $50,000 for each separate offense or to imprisonment for a period of not more than two years, or both.
(d) Continuing violations.--Each day of continued violation of any provision of this chapter, any rule or regulation of the department, any condition of any permit or order of the department issued pursuant to this chapter shall constitute a separate offense.
(e) Jurisdiction.--All summary proceedings under the provisions of this chapter may be brought before any district justice of the county where the offense occurred or in the county where the public is affected, and to that end jurisdiction is hereby conferred upon the district justices, subject to appeal by either party in the manner provided by law for appeals from summary convictions. It shall be the duty of the district attorney of the county to represent the interests of the Commonwealth.
(f) Shipping documents.--A properly prepared shipping document shall be prima facie evidence of the contents of a vehicle carrying hazardous materials.

§ 8307. Hazardous Materials Transportation Advisory

Committee.

(a) Membership.--There shall be a Hazardous Materials Transportation Advisory Committee appointed by the secretary. The committee shall be composed of an authorized representative from the Department of Transportation, who shall chair the committee, the Office of Attorney General, the Department of Health, the Department of Environmental Resources, the Pennsylvania State Police, the Pennsylvania Emergency Management Agency and the Pennsylvania Public Utility Commission and representatives of the hazardous materials industry and the public as follows:

1. A manufacturer or shipper.
2. A consignee or user.
3. A common carrier.
4. A private carrier.
5. A representative of the fire services.
6. A representative of the emergency medical services.
7. A representative with highway safety experience.
8. A member from the general public.
9. Others deemed appropriate by the secretary.

(b) Duties.--The committee may review all regulations and advise the department on all matters concerning the highway transportation of hazardous materials.

§ 8308. Report to the General Assembly.

Within one year of the effective date of this chapter, the secretary shall cause to be filed in the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives a report explaining the department's efforts to:

1. Appoint all members of the Hazardous Materials Transportation Advisory Committee representing private interests and the public.
2. Conduct terminal inspections and road checks in a uniform manner across this Commonwealth.
3. Utilize Federal funds to the fullest extent practicable.

4. Coordinate inspections with the United States Office of Motor Carrier Safety.

Supreme Court, U.S.
FILED
2005
OFFICE OF THE CLERK

No. 05-4

In The

Supreme Court of the United States

Steven Smith,
Petitioner

v.

Consolidated Freightways, Inc.,
Respondent

On Petition for *Writ of Certiorari*
To the Supreme Court of Pennsylvania

Brief in Opposition to *Writ of Certiorari*

Lawrence F. Barone, Esquire
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QUESTIONS PRESENTED

I. Whether the Pennsylvania courts lacked subject matter jurisdiction over Petitioner's claim when Respondent Employer filed an untimely Notice of Denial, in violation of federal and state regulations?

II. Whether the Pennsylvania state courts violated Petitioner's due process rights when the courts:

a) Failed to admit or consider relevant evidence;
b) Failed to act on Employer's withholding of reports essential to Petitioner's claim;
c) Failed to act on Petitioner's undisputed allegations that Respondent committed perjury by submitting false evidence;
d) Failed to entertain an appeal of Petitioner's claim.

III. Whether Pennsylvania state courts erred in failing to enforce an agreement between Respondent and the Department of Labor mandating OSHA compliance?

PARTIES

STEVEN SMITH,

Petitioner/Claimant,

a commercially licensed driver,

v.

CONSOLIDATED FREIGHTWAYS, INC.,

Respondent/Employer,

a self-insured common carrier.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Steven Smith, was employed by the Respondent, Consolidated Freightways, as a truck driver. He filed a Claim Petition for workers' compensation benefits under the Pennsylvania Workers' Compensation Act in May of 1996. This Petition alleged a date of injury of February 28, 1996, and the injury was described as exposure "to an unknown leaking poison, which caused shortness of breath, irritated throat, sour taste in mouth, toxic bronchitis, and lingering cough." Petitioner was seeking wage loss benefits from April 12, 1996, and into the future, as well as medical bills and counsel fees.

In the original Claim Petition, it was stipulated that the period of disability was less than 52 weeks. Under the Pennsylvania Act, this allows the parties to submit medical reports instead of presenting medical testimony. Petitioner submitted narrative reports from Dr. Nellhaus, a pulmonary specialist. The Respondent submitted the medical report of Dr. Guzzardi, who is board certified in family medicine, emergency medicine, and toxicology.

The Workers' Compensation Judge found that the Petitioner's testimony was credible regarding his exposure to a chemical identified as trichloroethane, but found that the Petitioners' medical expert, Dr. Nellhaus, was less credible than the Respondent's medical expert, Dr. Guzzardi. The Workers' Compensation Judge concluded by decision dated October 15, 1997, that no injury or disability resulted from the exposure to the chemical.

Petitioner appealed the decision of the Workers' Compensation Judge to the Pennsylvania Workers' Compensation Appeal Board. The Board affirmed the decision by Opinion and Order dated December 31,1999. No appeal was taken to the Commonwealth Court of Pennsylvania.

On September 27, 2001, the Bureau of Worker's Compensation received a second Claim Petition, which

alleged the same date of injury, and again described a chemical exposure to hazardous material. It was assigned to a new Worker's Compensation Judge. Petitioner presented a number of Exhibits at the first hearing, but additional testimony was not taken. The Workers' Compensation Judge denied the second Claim Petition in his Decision and Order dated March 26, 2002, and the basis of the Decision was that the Petitioner was barred from bringing this Petition based upon the doctrine of *res judicata*.

The Petitioner appealed this Decision to the Workers' Compensation Appeal Board. The Appeal Board affirmed. Petitioner then appealed to the Commonwealth Court of Pennsylvania, where the Decision was again affirmed. Petitioner then filed an Application for Reargument, which was denied.

Petitioner filed a Petition for Allowance of Appeal before the Supreme Court of Pennsylvania. This Petition was denied. Petitioner then filed a Petition for Reargument, which was also denied.

The Petitioner filed a timely Petition for Writ of Certiorari to this Court. This Brief is submitted in Opposition to the Petition.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States set forth the character of the reasons the Court considers in reviewing a Petition for Writ of Certiorari:

> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matters; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to cause for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10.

Rule 10 goes on to state that such a petition is rarely granted when the asserted errors consist of erroneous factual findings or the misapplication of a properly stated rule of law. The Respondent asserts that this is precisely the nature

of the Petition for Writ of Certiorari in this case. It should therefore be denied.

A. SUBJECT MATTER JURISDICTION

Petitioner alleges that the Pennsylvania Court lacks subject matter jurisdiction due to the untimely filing of a Notice of Denial. It is unclear from the Petitioner's brief if this references the Notice of Denial or the Answer to the Claim Petition, which are two separate documents under the Pennsylvania Worker's Compensation Act. What is clear is that this argument references the first Claim Petition filed in this case. This issue was not preserved in the first appeal to the Worker's Compensation Appeal Board, and it is therefore waived, Wheeler v. W.C.A.B (Reading Hospital), 829 A2d 730 (2003).

The Answer to the Claim Petition in this case was not filed late. The twenty (20) day period for an answer begins running on the date of assignment of the Petition to the Workers' Compensation Judge, not the date of filing of the Petition, 77 P.S. 775 and 821.

More importantly, neither the filing of a late Notice of Denial, nor the filing of a late Answer divests the Workers' Compensation Judge of jurisdiction. If the Answer were to have been filed late, it simply would have resulted in an admission by the Respondent of the well pled allegations of the Petition, 77 P.S. 821. That was not the case.

Petitioner's citation of Carlisle v. United States, 517 U.S. 416 (1996), is totally inapplicable to the workers' compensation system of the Commonwealth of Pennsylvania. It concerns the untimely filing of a Motion for Acquittal in a criminal case, which is in violation of the Federal Rules of Criminal Procedure. If the Pennsylvania courts were deprived of subject matter jurisdiction in this case, the obvious question is, what have we been doing since the second Claim Petition was filed in 2001? The argument is baseless, and should be ignored.

B. DUE PROCESS RIGHTS

Petitioner alleges four violations of his due process rights. These will be dealt with in the order stated.

1) Failure to Consider Relevant Evidence

The Petitioner cites alleged errors in numerous findings of fact, but ignores the most glaring feature of this case. The matter was previously litigated, and while the Petitioner's testimony was found credible that he was exposed to the chemical, it was found that no injury or disability resulted from the exposure. When the Pennsylvania Appeal Board, which is the first appellate level in the Pennsylvania workers' compensation system, denied the appeal, no further appeals were taken.

Therefore, when the second Claim Petition was filed, the Respondent interposed the defense of *res judicata*. *Res judicata* has been defined by the Pennsylvania Courts in the same fashion that it is defined in other jurisdictions. In order for *res judicata* to bar recovery, the following four conditions must exist:

(1) Identity in the thing sued upon or for;
(2) Identify of the cause of action;
(3) Identify of the persons and parties to the action; and
(4) Identify of the quality or capacity of the parties suing or sued.

J & L Steel Corporation v. W.C.A.B. (Jones), 602 A.2d 912, 915 (Pa. Cmwlth. 1992).

In the case at bar, the two petitions involve the same claim, which is a claim for injury due to exposure to hazardous chemicals. The cause of action is the same, as they

are both workers' compensation proceedings. The parties to the action are the same, and the parties are acting in the same capacity in both petitions. While there were minor changes in the wording of the two petitions, the proceedings involved the same exposure to chemicals and the same alleged injury.

In other words, the Petitioner had the benefits of due process during his first Claim Petition, which was fully litigated and decided in favor of the Respondent. Due process does not demand that a litigant can return to the Court years after a fully litigated case was decided against him and request that he get a second opportunity.

The numerous citations to alleged errors in findings of fact do not constitute due process violations. Under the Pennsylvania Workers' Compensation Act, the Workers' Compensation Judge is the finder of fact, and those findings will not be disturbed upon appeal so long as the findings are supported by substantial competent evidence, Lehigh County Vo-Tech School v. W.C.A.B. (Wolfe), 652 A2d 797 (Pa. 1995).

2) Withheld Evidence

Without further comment, Petitioner's brief alleges that the Pennsylvania Court failed to act when the employer withheld reports material to Petitioner's case, in violation of his due process rights. This argument is nearly identical to the third alleged violation and, therefore, this will be dealt with in detail in the next section.

3) Submission of False Evidence

Although not clearly stated in Petitioner's argument, this appears to be based upon the allegation that the Respondent did not provide Material Safety Data Sheets concerning the chemical which was the source of the exposure. The Petitioner produced this evidence at the hearing held after the filing of the second petition. If the

chemical were unknown at the time of the prior litigation, or there had been a denial that it was hazardous, this claim would conceivably have merit. Unfortunately, Petitioner again ignores the basis of the original decision in this case.

The Workers' Compensation Judge found that the Petitioner was exposed to Trichloroethane, but he found that there was no injury or disability resulting from this exposure. Therefore, the identity of the chemical was known. However, in order for there to be recovery under the Pennsylvania Workers' Compensation Act, there must be an injury causing disability. Therefore, the precise nature of the chemical is irrelevant because it was found that the Petitioner was not injured by this exposure. This formed the basis of the denial of Petitioner's Request for a Rehearing. Since no injury was proven, the nature of the chemical was immaterial, and the Request for Rehearing was properly denied. This is particularly true since the request was untimely.

4) Failure to Entertain Appeals

Petitioner alleges that the Pennsylvania State Court violated his due process rights when it failed to entertain an appeal of his claim. What he is actually arguing is that his due process rights were violated because he was not successful. Obviously, due process does not require that the Petitioner win.

It is only necessary to review the Opinions and Orders below set forth in the Petition for Writ of Certiorari to determine that the Pennsylvania Courts have certainly entertained this appeal. In fact, at every stage of the appellate process, the Petitioner applied for reargument after he was unsuccessful. The Supreme Court of Pennsylvania did not accept the appeal from the Commonwealth Court, but this is due to the fact that, just as in this Honorable Court, review of the case by the Pennsylvania Supreme Court is not a matter of right, but rather, a matter of judicial discretion. This does not constitute a violation of due process rights.

C. OSHA ALLEGATIONS

Petitioner alleges that the Pennsylvania State Courts erred when they failed to enforce an agreement between the Respondent and the Department of Labor concerning OSHA compliance. As should be evident, the case at bar involves a Pennsylvania workers' compensation proceeding. It is not an OSHA dispute, an ERISA dispute, or a union dispute. All of those rights have a remedy, but they are not tried before the Pennsylvania workers' compensation authorities. More importantly, they have nothing to do with this Claim Petition.

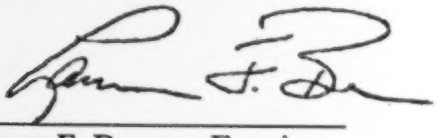
CONCLUSION

In conclusion, this appeal arises from a workers' compensation claim proceeding which was filed nearly ten years ago. The original Decision found that the Petitioner was exposed to the chemical, but that he was not injured as a result. After the initial level of appeal, the case went no further.

For unknown reasons, a second Petition is filed to further discuss the nature of the chemical, but no new medical evidence is produced to demonstrate that the Petitioner now suffers an injury. Petitioner's request for the second bite of the proverbial apple was appropriately denied, and the request for rehearing was denied because the fatal flaw in the Petitioner's argument is the fact that he was not able to demonstrate injury or disability. Since no true federal or constitutional question is at issue here, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FARRELL & RICCI, P.C.

By: 

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No. 05-4

Supreme Court, U.S.
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In The

Supreme Court of the United States

Steven Smith,

Petitioner

v.

Consolidated Freightways, Inc.,

Respondents

On Petition for *Writ of Certiorari*
To the Supreme Court of Pennsylvania

Reply to Brief in Opposition to
Petition for *Writ of Certiorari*

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PETITIONER/*EMPLOYEE'S* REPLY TO RESPONDENT/*EMPLOYER'S* COUNTERSTATEMENT OF THE CASE

Respondent's Counterstatement of the Case does not address Petitioner's allegations of fraud. At the first 1996 hearing, Respondent's counsel stated that the shipment was not damaged, inferring that Petitioner was not "exposed" which is perjury contradicted by the OSHA agreement.

Petitioner's treating physician cited information found on the internet, which upheld medical findings on Petitioner's pulmonary injury, information that WCJ Vallely capriciously disregarded in 1997 Decisions and Orders.

Respondent's expert did not examine Petitioner; Respondent's October 8, 1996 *hearsay* expert report referenced the wrong version of the chemical, a serious omission as it did not include Respondent's Chemrex MSDS information on the Dioxane component of Respondent's damaged shipment. WCJ Vallely misquoted Respondent's report in 1997 Findings of Fact. Therefore, state appellate courts erroneously upheld inaccurate *hearsay* evidence.

Respondent illegally withheld Chemrex MSDS and Petitioner's panel medical reports and instead, fraudulently provided incorrect information to the workers compensation authorities. Respondent's actions interfered with Petitioner's medical treatment.

The WCJ found that Petitioner was "exposed" to the "*right to know*" chemical, which triggered federal jurisdiction and Petitioner's right to information and medical treatment. When Respondent withheld Chemrex MSDS and Petitioner's 1996 panel medical reports, it violated the "*right to know*" laws on federally controlled toxic chemicals and its settlement agreement with OSHA. Therefore, self-insured Respondent contested Petitioner's Claim in bad faith.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States dictates that the Court may grant a Petition for Writ of Certiorari based on, *inter alia*, a state court decision which implicates an important question of federal law that the Court should settle; or has decided a matter of federal law in a manner conflicting with other state and federal courts' applications of the law in question.

In the instant matter, Petitioner suffered the injury in question after Respondent violated an agreement between Respondent and the Department of Labor, under OSHA, a federal law. To hold Respondent to no account for this action would amount to a negation of federal executive authority to enforce federal law, and yet this is exactly what the state courts have proceeded to do. Further, for the Workers' Compensation Judge (WCJ) to misquote Petitioner's medical expert's information in reaching a conclusion that Petitioner suffered no injury as a result of exposure, and for no means of redress to exist, operates to deprive Petitioner of his right to due process under the Fourteenth Amendment.

A. SUBJECT MATTER JURISDICTION

I. The Pennsylvania state courts lacked subject matter jurisdiction over Petitioner's case.

In order for a court to have subject matter jurisdiction over a case, required filings and responses must be timely or subject matter jurisdiction is divested. See Carlisle v. United States, 517 U.S. 416 (1996). While Carlisle involved a criminal case, nowhere does the language used by the Court expressly limit the holding to criminal matters. In fact, basic procedural rules recognize the maxim that Courts do not entertain untimely filed documents except in rare circumstances. State and federal procedural rules govern the

filing of responses to pleadings, a failure to follow mandated timelines amounts to an admission or a default. See, e.g., Supreme Court Rules (governing the timing of response to Petition for Certiorari); and the Pennsylvania Workers' Compensation Act, where an employer has 20 days from the date of injury to file a Notice of Denial. 77 P.S. 771.

Subject matter jurisdiction was divested pursuant to the Workers' Compensation Act but federal jurisdiction lies constitutionally and substantively in the express language of transportation and safety statutes and regulations. Respondent's untimely pleadings must be construed in favor of Petitioner, and in light of the following:

1) That state court decisions and orders failed to incorporate the parties' rights and responsibilities pursuant to federal safety and transportation statutes, in violation of the Fourteenth Amendment.

2) That state courts failed to enforce Respondent's agreement with OSHA, to the prejudice of Petitioner, in violation of the Fourteenth Amendment.

Petitioner's date of injury was February 28, 1996 and Respondent filed its Notice of Denial on May 6, 1996, assuming the burden of proof to deny disability benefits, after Respondent did the following:

1) February 28, 1996, knowingly loaded damaged containers, in violation of federal law; without giving Petitioner protective equipment and warning, and without Chemrex MSDS on the *right to know* chemical in its damaged container.

2) March 1, 1996, filed a false Transportation report that shipment was damaged <u>in transit</u> to cover up its violation, as it was a criminal act. The report did acknowledge Petitioner's injury from exposure.

3) March 6, 1996, OSHA opened its investigation of Petitioner's February 28, 1996 HM[1] accident.

4) April 12, 1996, Respondent signed a settlement agreement with OSHA to its abate fines, agreeing to come into compliance with federal safety law;

5) Federal Witness Petitioner was coerced as follows:

   a) Respondent failed to disclose Chemrex MSDS in 1996 to Petitioner, his medical providers, and the workers compensation courts;

   b) WCJ granted Respondent's contest of Petitioner's medical expenses, in violation of federal law and the OSHA agreement;

   c) Petitioner's union failed to subrogate its payment of wage and medical expenses incurred by Respondent's liability;

   d) The courts exercise of jurisdiction over Respondent's untimely Notice of Denial occasioned losses to Petitioner, including, wages and medical expenses; attorney fees, vacation and sick days, a $5,000 disability insurance claim and a $1,000 loss in monthly pension income, for claiming benefits early.

   e) Respondent concealed its knowledge of the Chemrex MSDS and fraudulently submitted an expert report a less toxic version of the chemical. Therefore, Respondent contested Petitioner's disability claim in bad faith.

   f) 2001 to date, the state courts failed to grant a hearing to submit Petitioner's evidence of fraud; nor have the state courts treated

---

[1] '*Hazardous material*' means a substance or material which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety and property when transported in commerce, and which has been so designated. [Federal Regulation 390.5]

Respondent's non-responsive Answer to fraud allegations as a deemed admission.

Petitioner filed a Claim Petition on May 12, 1996 and Respondent filed its untimely Answer July 3, 1996. By express language of the statute, the WCJ was divested of jurisdiction to entertain Respondent's untimely pleadings.

State appellate courts invoked federal jurisdiction over this claim when they failed to enforce transportation/ safety state/federal laws and Respondent's agreement with OSHA, to the prejudice of Petitioner, giving rise to this appeal that the Supreme Court of the United State enforce Petitioner's federal rights through exercise of Supreme Court Rule 10 jurisdiction and its inherent constitutional authority.

B. DUE PROCESS RIGHTS

"[No state shall] deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV. Petitioner was deprived of property, including: wages and medical expenses; attorney fees, vacation and sick days, a $5,000 disability insurance claim and a $1,000 loss in monthly pension income, for claiming benefits early.

Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). Such rules "minimize substantively unfair or mistaken deprivations" of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S., at 81, 92 S.Ct., at 1994.

1) The Pennsylvania state courts violated Petitioner's right to due process when they failed to consider relevant evidence.

October 15, 1997 Order, the Workers' Compensation Judge (WCJ), empowered as an agent of the state to dispose of workers' compensation claims, acknowledged Petitioner's "exposure" to a poisonous chemical but dismissed the Claim Petition based on Respondent's expert report from a non-examining MD, and based on many legal and factual conclusions that were erroneous, or had no basis in record evidence. Errors included the date of injury and identity of the chemical causing the injury. In its legal conclusion that Petitioner's respiratory injury was not caused by exposure to a chemical, albeit the wrong chemical, the WCJ materially misquoted the report of Petitioner's pulmonary physician, when the WCJ stated that this physician's report did not provide a causal link between exposure and injury:

> "I can say with a reasonable degree of medical certainty that the exposure of this chemical was temporally related to the onset of this patient's respiratory complaints. The exposure did subject the patient to a period of disability; I would not expect this disability to be permanent, however."
>
> Dr. Nelhaus 09/23/96

Self-insured Respondent's expert relied upon "*absence of literature*" as opposed to review of literature in reaching a conclusion. Nevertheless, the Workers' Compensation Judge adhered to Respondent's expert's conclusion against the weight of the evidence.

Respondent had actual and constructive MSDS Notice on transit of federally controlled "*right to know*" chemicals. Therefore, Respondent's "*absence of literature*" expert excuse is implausible and the court's discretion preempted by federal regulations 397.2- 397.3.

Although the appellate courts were to utilize a "capricious disregard" standard of review as to a workers' compensation case or other administrative proceeding, they did not disturb the WCJ's conclusions and findings where a capricious disregard existed.

Therefore, many of the factual findings were made contrary to or absent substantial evidence that the court relied upon to support conclusions of law drawn to deny the claim. Moreover, many of the factual findings failed to consider Petitioner's evidence at all, in favor of Respondent's. On appeal, the invalidity of the WCJ's findings were not disturbed.

In addition, *res judicata* should not have attached where Petitioner was granted a hearing to submit substantial Chemrex MSDS evidence about the correct identity of the chemical to which Petitioner had been exposed, evidence that Respondent illegally withheld in the initial litigation.

2) The Pennsylvania appellate courts failed to act on allegations that Respondent withheld reports material to Petitioner's disability claim, in violation of Petitioner's due process rights and in violation of state and federal law.

3) The Pennsylvania appellate courts violated Petitioner's due process rights by failing to act on undisputed allegations that self-insured Respondent/employer perjured itself by submitting false evidence.

September 2001, Petitioner filed a Claim, with the Pennsylvania department of labor, alleging that Respondent knowingly and fraudulently contested his Claim for Benefits in 1996 and requested a hearing to admit evidence to support Petitioner's allegations of Respondent's fraud. Petitioner reasonably alleged that self-insured Respondent/employer made a bad faith contest by refusing to pay Petitioner's wages, medical bills and attorney fees under the Act.

The Department of Labor granted Petitioner a hearing before Judge Henry in November 7, 2001, to consider Petitioner's material and non-cumulative evidence. Respondent never responded to Petitioner's allegations of fraud. The Notice to attend the hearing expressly stated that failure to address the allegations raised in the petition are deemed admissions. The court failed to permit cross-examined testimony.

Judge Henry did not address Respondent's failure to respond to allegations of fraud, a deemed admission, and upheld Respondent's affirmative defenses, which are supported by 1997 judicial errors of fact and inadmissible hearsay, to deny Petitioner's claim.

Under the doctrine of *res judicata*, recovery in a subsequent suit is barred only if four conditions are met: (a) identity of the thing sued upon or for; (b) identity of the cause of action; (c) identity of the persons and parties to the action; and (d) identity of the quality or capacity of the parties suing or sued. Jones & Laughlin Steel Corp. v. W.C.A.B. (Jones), 602 A.2d 912, 915 (Pa. Cmwlth. 1992). Petitioner's 2001 claim, alleging Respondent's fraud, did not meet the requirements of *res judicata* as identity of the thing sued upon or for does not exist between Petitioner's two claims.

July 29, 2003, the WCAB entered an Opinion and Order, which upheld Respondent's affirmative defenses and noted Petitioner's failure to Request a Section 426 Rehearing within eighteen (18) months of a 1999 Decision and Order. The WCAB procedurally denied Petitioner's 2001 fraud Claim, supported by documents acquired in 2001 from OSHA through efforts of Petitioner's federal representative.

December 23, 2003, the Pennsylvania Commonwealth Court entered an Opinion and Order, favoring Respondent's affirmative defenses over Petitioner's substantive claims.

4) The Pennsylvania state court violated Petitioner's due process rights when it failed to entertain an appeal of Petitioner's claim.

As the above illustrations have shown, Petitioner was denied due process at the initial stages of his workers' compensation proceedings. Appellate review may have corrected the denial of Petitioner's due process rights and the errors made by the Workers' Compensation Court. However, the Pennsylvania Supreme Court declined to hear Petitioner's appeal, merely continuing the pattern of deprivation. (See Appendix to *Petition for Writ of Certiorari* at 24, 25).

C. ENFORCEMENT OF AGREEMENT BETWEEN RESPONDENT AND DEPARTMENT OF LABOR MANDATING OSHA COMPLIANCE

Petitioner's union failed its duty to seek enforcement of the rights and duties of the parties under contracts and agreements with Respondent, an apparent conflict of interest by trustees of the union's health and welfare ERISA plan, where Petitioner was unable to get a grievance committee hearing due to correspondence by Respondent's management employee trustee and the union's business agent trustee.

The union's failure to investigate Petitioner's claim or to grant him a grievance hearing was fatal to Petitioner's claim. Self-insured Respondent and the union's ERISA plan realized economic benefit, at Petitioner's expense.

Respondent violated its settlement agreement, to comply with 29 CFR 1910.1200, federal regulation of exposure to toxic and hazardous substance, by refusing to pay for Petitioner's medical treatment.

Respondent, by refusing to treat Petitioner for chemical exposure and withholding MSDS information on a federally regulated "right to know" chemical, violated Petitioner's state and federal rights under:

1) the workers' compensation act,

2) state and federal transportation regulations,
3) the hazardous material "right to know" law,
4) its settlement agreement with OSHA,
5) its Union contract,
6) the Union Constitution,
7) Petitioner's employee ERISA benefits,
8) a court order in WDPA at 78 cv 791 H, enforcing National Master Freight Agreement.

The state courts prejudiced Petitioner by failing to enforce Respondent's agreement with OSHA. The Workers' Compensation Act operates as an exclusive remedy to work-related injuries and related claims. Therefore, under the Act, an employee has no other means of redress. Thus the state courts' failure to entertain Petitioner's allegations that Respondent fraudulently contested his 1996 Claim in bad faith; and the state courts' failure to enforce Petitioner's constitutional and federal claims violated Petitioner's rights under the Fourteenth Amendment.

CONCLUSION

Petitioner's 2001 Claim was a good faith effort to redress Respondent's 1996 misconduct in the initial workers compensation litigation.

WHEREAS, for the foregoing reasons, and because this case involves deciding the scope of due process rights under the Fourteenth Amendment and because this case will significantly impact the effect of government-private agreements as law, Petitioner requests that this Honorable Court grant a *Writ of Certiorari* in the instant matter.

Respectfully submitted,

August 18, 2005

Mary Ellen Chajkowski, Esquire
Petitioner's Counsel of Record

Supreme
OCT 2 - 2005
OFFICE OF THE CLERK

No. 05-4

In The

Supreme Court of the United States

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

On Petition for Rehearing
To the Supreme Court of the United States

Petition for Rehearing

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QUESTIONS PRESENTED

I.

Whether Petitioner may challenge jurisdiction?

ANSWER: Yes.

II.

Whether Petitioner's Statutory and Constitutional Due Process Claims Warrant a *Writ of Certiori*?

a) Rule 29.6 Disclosure;
b) Heightened Standards of Review;
c) Motion to Dismiss Construction;
d) Respondent Admissions;
e) Pennsylvania Authority.

ANSWER: Yes.

III.

Whether Respondent's Contest of Petitioner's Claim, Inconsistent With Its OSHA Compliance Agreement Based on Same Operative Facts, Constituted Fraud?

ANSWER: Yes.

PARTIES

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

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CERTIFICATION OF COUNSEL

I certify this Petition for Rehearing is restricted to Intervening and Substantial grounds not previously presented; and that I present this Petition for Rehearing in good faith and not for delay.

This action must be construed as a bundle of statutory rights and duties, arising from a workers' compensation claim for payment of medical expenses and disability wages, where CDL Petitioner's mucous membrane was damaged by Respondent's shipment of unmarked/damaged containers of Dioxane poison. A toxic accident, cited/fined by OSHA and settled by Agreement with Respondent, that was never enforced.

Substantial Grounds

Respondent Rule 29.6 Corporate disclosure;
Correct the Application of Law to Motion to Dismiss;
Enforce Respondent's Agreement;
Strict scrutiny standard of review to Petitioner;
Arbitrary/capricious review to self-insured employer.

Intervening Grounds

Petitioner recently learned that an associate attorney of Respondent's Counsel was cited in 2005 by the state disciplinary board and sanctioned by the Pennsylvania Supreme Court for misrepresentations. It is material to this action, as the legal work of the sanctioned associate was concentrated in defending workers compensation matters on behalf of insurance companies and self-insured companies, as here.

Respectfully submitted,

Mary Ellen Chajkowski, Esquire

JURISDICTIONAL STATEMENT

Order to be Reviewed

Steven Smith v. Consolidated Freightways, No. 05-4, (The Supreme Court of the United States 2005), the Petition for *Writ of Certiori* denied, October 3, 2005.

Statutes Conferring Jurisdiction

Rules of the Supreme Court of the United States,

Rule 44, Petition for Rehearing,
Substantial Grounds not previously presented, and Intervening Grounds.

Rule 29.6 Corporate Disclosure.

Rule 10 (a) and (c).

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make. U.S.C.A. Const. Art. III s2, cl.2

Cases in the courts of appeals may be reviewed by the Supreme Court by: (1) *writ of Certiori* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. 28 U.S.C. s.1254 (1988).

U.S. Const. Amend. XIV, section 1 "....nor shall any State deprive any person of life, liberty, or property, without due process of law.

SUMMARY OF THE ARGUMENT

CDL employee v. Self-insured employer.

Self-insured Respondent did not deny Petitioner was unfit to return to work, it denied that Petitioner's disability was work related. Self-insured Respondent's dishonest representations to the courts must be construed against its Motion to Dismiss Petitioner's un-litigated allegations of perjury and fraud, as the Chemrex Material Safety Date Sheets (MSDS) in Respondent's possession contradict its expert report on the wrong chemical; and Respondent's contest of Petitioner's medical expenses.

Petitioner, a thirty-year employee, was denied emergency medical treatment, lost wages, payment of costs, medical expenses, attorney fees, a $5,000 disability insurance policy, and a $1,000 (one thousand) monthly pension penalty.

Self-insured Respondent falsely asserts in its Brief in Opposition to Petition for *Writ of Certiori* that there was a stipulation on the term of Petitioner's disability, as there was no hearing on the issue. *See* Appendix II, p. 133, hearing transcript. Further, there is an ERISA subrogation issue, *see* Appendix II, p. 17, from the union health and welfare fund.

Petitioner reasonably Petitions for Rehearing and requests proper application of law and construction to Respondent's Motion to Dismiss as *res judicata,* un-litigated allegations of perjury and fraud, applying a heightened standard of review to each party, and enforcing this honorable court's Rule 29.6 Corporate Disclosure.

PETITIONER'S ARGUMENT

CDL employee v. Self-insured employer.

The Department of Labor granted Petitioner's 2001 Claim Petition, requesting a hearing to admit relevant evidence, Chemrex Material Safety Data Sheets (MSDS) and Health Assistance for Personnel in Industry (HAPPI) medical records, withheld by Respondent in its Contest of Petitioner's 1996 hazardous material (HM) exposure and injury Claim.

Petitioner herein appeals state court decisions granting Respondent's 2001 Motion to Dismiss un-litigated allegation of perjury and fraud, where self-insured Respondent:

- Withheld Chemrex Material Safety Data Sheets. *See* Appendix II, [herein **II**], at p.1;
- Filed false and/or misleading LIBC Notice of Denial, **II**, p.85 and Answer **II**, p. 91.
- Its counsel disputed that Petitioner was exposed to 'poison', contrary to Chemrex MSDS. **II**, p.122;
- Its counsel denied HM shipment was damaged, contrary to OSHA citation/fines for damaged containers of Dioxane. **II**, p.132;
- Withheld Petitioner's 1996 HAPPI panel records, finding Petitioner unfit to return to work. **II**, p.29-36;
- Contested or refused to pay HAPPI medical expenses;
- Submitted a report, **II**, p.97,on a different chemical, which did not incorporate Chemrex MSDS or its Dioxane, **II**, p.37,(CAS No. 123-91-1) component. .
- Failed to Answer, statutory admissions. **II**, p.51.

Self-insured Respondent contested Petitioner's Claim and entered a Compliance Agreement with the Department of Labor, taking inconsistent legal positions arising out of the same operative facts. Failure to construe perjury and fraud allegations in favor of Petitioner may be evidence of *bias*.

Pennsylvania courts failed to equitably enforce the statutory rights and duties of the parties in this action, including 'Right to Know' laws. **II**, p.15. Where courts may not comprehend technical matters, the constitutional duty to enforce procedure provides equitable opportunity to prove or disprove party allegations and responses.

I. Subject Matter Jurisdiction.

Petitioner has 'standing' to challenge jurisdiction. Work injured claimants may file Petitions within 300 weeks of work injury, which Petitioner did.

Respondent's Counsel of Record raised ambiguity regarding Respondent's 'standing' by stating at a hearing before the Appeal Board in June 2005, that Respondent is out of business and out of contact with the counsel of record.

Respondent's Counsel of record sent an April 2004 letter to Petitioner's Counsel, **II**, p. 17, which referred to a directive by an unidentified "client" requesting that a report be filed against Petitioner's Counsel with the Pennsylvania Disciplinary Board. Respondent has successors and affiliates, a 2003 Bankruptcy Notice was sent to Petitioner, **II**, p.57.

II. Fourteenth Amendment Due Process.

a) Rule 29.6 Corporate Disclosure.

Respondent failed to include its Corporate disclosure in its Brief in Opposition to Petition for *Writ of Certiori*, a Rule 29.6 filing requirement of the U.S. Supreme Court:

> "Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a non-governmental corporation shall contain a corporate disclosure statement identifying the the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock.
>
> If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document." Rule 29.6 Corporate Listing.

Self-insured Respondent's Notice of Bankruptcy was mailed to Petitioner in 2003. *See* **II,** p.57.

June 2005, at a hearing before the Appeal Board, Respondent's Counsel stated that Respondent was out of business and out of contact with counsel, which Petitioner refuted by mailing a copy of Counsel's April 29, 2005 letter **II**, p. 17, referring to "client" contact directing counsel of record to file professional conduct charges against Petitioner's counsel.

An Intervening Ground for Rehearing, here, is that an associate attorney working for Respondent Counsel's firm was sanctioned June 16, 2005 upon Recommendation of the state Disciplinary Board to the state Supreme Court, citing a pattern of misrepresentations. That associate charge is relevant to this action, as the report stated that legal work of the sanctioned associate was concentrated in defending workers compensation matters on behalf of insurance and self-insured companies.

Self-insured Respondent is a corporation, Rule 29.6 is relevant and Petitioner requests enforcement of the rule.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id. Self-insured Respondent litigated to avoid its statutory liability to pay medical expenses. The 1996 Contest of this Claim is contrary to MSDS scientific information and medical records of HAPPI panel providers finding Petitioner unfit to work.

b) Heightened standards of review apply here.

1. Petitioner is a protected person subject to "*Strict Scrutiny*" standard of review.

Petitioner, a commercially licensed driver, is a "protected person" pursuant to OSHA and Transportation public safety statutes *(cited* in Appendix I). The federally regulated hazardous material, which injured Petitioner, was shipped into Pennsylvania 'damaged' on Respondent's trailer and reloaded 'damaged' at Respondent's Pittsburgh terminal.

Petitioner's "protected person" status subjects this action to the *strict scrutiny* appellate standard of review.

2. Self-insured Respondent is subject to a heightened *arbitrary and capricious* Standard of Review.

Self-insured Respondent/ *common carrier* is a *fiduciary* by statute and a self-insured employer and decision maker as contemplated in Pinto v. Reliance Standard Life Ins. Co., 214 F. 3d 377,378 (3d Cir. 2000), where the third circuit held insurers to a standard of review commensurate with their duty: "when a [an insurance] company both funds and administers benefits, it is generally acting under a conflict that warrants a heightened form of the *arbitrary and capricious* standard of review. Id.

Respondent violated federal regulations by not properly repackaging its damaged shipment and attaching Chemrex Material Safety Data Sheet (MSDS), before reloading it for local deliveries from the Pittsburgh terminal.

Petitioner was given no warning that Respondent's illegally loaded HM shipment was damaged, no protective equipment and was not sent for emergency medical treatment, pursuant to MSDS instructions in Respondent's possession and contrary to its OSHA Settlement Agreement.

c) Respondent's Motion to Dismiss

State courts erred by failing to construe allegations and evidence in favor of Petitioner, affirming Respondent's 2001 Motion to Dismiss un-litigated perjury and fraud allegations. There is no preclusion on state court decisions upholding dismissal, which are not supported by procedural due process. "In a federal action following a state court action, the state court judgment is not given preclusive effect when the party against whom the decision is rendered did not have a full and fair opportunity to litigate the claim or issue in state court." Haring v. Prosise, 462 U.S. 306 (1983).

The courts' failure to construe pleadings in favor of Petitioner constituted a legal error, in violation of federal statute and Petitioner's 14th Amendment due process rights. "In the procedural context of a Motion to Dismiss, we accept the factual allegations as true and plaintiff receives the benefit of all reasonable inferences to be drawn therefrom. Angelastro v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). We may not affirm the dismissal of the complaint unless plaintiffs can prove no set of facts that would entitle them to relief. City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 41, 45-46, (1957). State courts failed to construe 'perjury and fraud' allegations in favor of Petitioner, and inequitably applied the law to dismiss Petitioner's disability claim, a Fourteenth Amendment violation.

Judicial failure to enforce express statutes, **II**, p.15, including Respondent's liability to pay Petitioner's medical and pharmaceutical expenses; unfairly distributed the burden to pay. Petitioner's medical expenses were paid by family members, Veterans Administration funds and a union health and welfare ERISA fund, which notified Petitioner of its intent to subrogate, **II**, p.71.

d) Respondent Admissions Contradict Dismissal.

Self-insured Respondent had *common carrier* statutory Constructive Notice of its MSDS duty to warn and protect Petitioner prior to the 'exposure' accident; and Actual Notice on February 29, 1996 when Chemrex MSDS was received, direct knowledge of its duty for 'exposure to Dioxane' and treatment of symptoms that Dioxane caused inhalation injury.

Respondent *scienter* may be construed by *strict scrutiny* of incomplete and false representations it made in litigation. Judicial failure to equitably enforce the law constituted 14th Amendment violations of Petitioner's right to due process.

Self-insured Respondent's[1] made false statements:

a) "..minor changes in the wording of the two petitions,"
1996 Petition alleged exposure to poison, Respondent denied 2001 Petition alleged perjury, Respondent claim res judicata.

b) "...the first Claim Petition was fully litigated"
1996 Notice of Denial was litigated contrary to MSDS. 2001 allegations of 1996 perjury/ fraud never litigated.

c) "...the findings are supported by substantial evidence",
1997 Decisions, adverse to Petitioner, make no MSDS reference and Respondent's report is inadmissible hearsay. Evidence from Petitioner's treating physician capriciously disregarded, Respondent's inadmissible report adopted.

"Petitioner's argument appears to be based upon the *allegation* that Respondent did not provide Material Safety Data Sheets concerning the chemical which was the source of the exposure."

"Petitioner produced this evidence at the hearing held after the filing of the second [2001] Petition."

---

[1] Respondent's Brief in Opposition to Petition for *Writ of Certiori*, p. 6.

Respondent's Admission[2] Contradicts Dismissal:

> "If the chemical were known at the time of the prior litigation, or there had been a denial that it was hazardous, this claim would conceivably have **merit.**"

Respondent makes a false representation[3] on the statutory relevance of Chemrex *"Material"* Safety Data Sheets:

> "Therefore, the precise nature of the chemical is irrelevant because it was found that the Petitioner was not injured by this exposure."

> "This formed the basis of the denial of Petitioner's Request for a Rehearing. Since no injury was proven, the nature of the chemical was immaterial, and the Request for Rehearing was properly denied."

Rehearing is warranted by violations of due process where state courts affirmed Respondent's Motion to Dismiss without a hearing to admit Petitioner's evidence.

Under the Fourteenth Amendment, due process mandates that once a state has created rights or benefits, these benefits may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a

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[2] Id. at p.7
[3] Id. at p. 7

person's right to enjoy what is his, free of governmental interference. Id.

Respondent's decision to withhold Chemrex MSDS in 1996; trial statements made by Respondent's Counsel denying that Petitioner was 'exposed,' **II**, p.122, to 'poison' or that the containers were 'damaged' **II**, p.132; and the fact that it submitted a false report, **II**, p.97, must be construed in favor of Petitioner. Respondent makes admissions that must be construed in favor of Petitioner, and Dismissal reversed.

d) **Pennsylvania Authority Holds Respondent Liable.**

Petitioner continued to work for two weeks after the accident and was never advised to go for medical treatment for respiratory complaints reported. Respondent never advised Petitioner to stop wearing the jacket 'exposed' on the date of accident. Petitioner violated no law by going on a vacation planned before the accident; he was too ill to enjoy the trip; he may not have traveled if he had the MSDS. Respondent bears the burden to prove its Notice of Denial

Respondent did no vocational assessment and offered Petitioner no alternative employment. Respondent made no attempt to return the injured employee to productive employment. Instead, Respondent litigated to avoid paying compensation, contrary to Pennsylvania authority. Giant Eagle v. Workers' Com. Appeal Bd. (Myers), 578 Pa. 94, 103-104 (Pa. Sup. Ct. 2004), *citing* Kachinsky v. W C AB (Vepco), 532 A.2d 374 (Pa. Sup. Ct. 1987). Respondent failed its duty to propose alternate work that is actually available, that claimant is capable of doing such work, and that claimant is given actual notice of the available work. Hockenberry v. Workers' Comp. Appeal Bd., 672 A.2d 393, 395 (Pa. Cmwlth. 1996).

State courts affirmed self-insured Respondent's Motion to Dismiss based on *res judicata* and *collateral estoppel* defenses to fraud and perjury allegations never litigated, an unprecedented exercise of judicial authority. Respondent cited workers' compensation cases where disability benefits had been received, not denied.

III. Respondent's Contest of Petitioer's Claim Is A Legal Position Contrary To Its DOL Compliance Agreement Based on the Same Operative Facts.

State courts failed to exercise concurrent jurisdiction to enforce Petitioner's statutory rights under federal law. The district court exercised concurrent jurisdiction in its Order at W.D. 78 cv 791 H, enforcing the National Master Freight Agreement against Respondent, where the district court construed allegations and admissions with the evidence. The district court held that: "An award may be vacated where it is shown that there was fraud, partiality, or other misconduct or where it violates a specific command of some law, or, where the award is inconsistent with public policy." *Citing* Black v. Cutter Laboratories, 43 Cal. 2d 788, 798, 278 P. 2d 905, 911 (1953). The district court held that provisions of the Vehicle Code, designed and intended by the state legislature to promote safe and proper use of its highways, constituted law and public policy; and that upholding a violation of law, as state courts did here, was contrary to public policy. State court failure to enforce statutory rights and duties, here, is a 14th Amendment violation adverse to Petitioner.

CONCLUSION

WHEREAS, state courts failed to apply heightened standards of review; to enforce Respondent's statutory duty; inconsistent with public policy, and a violation of Petitioner's 14th Amendment right to equal protection under the law. Petitioner requests that this court grant a Rehearing on the Petition for *Writ of Certiorari* in the instant matter.

Respectfully submitted,

10/20/05

_____

Mary Ellen Chajkowski, Esquire
Petitioner's Counsel of Record

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

APPENDIX II

No. 05-4

In The

Supreme Court of the United States

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

On Petition for Rehearing
To the Supreme Court of the United States

Petition for Rehearing

Mary Ellen Chajkowski, Esq.
Petitioner's Counsel of Record
Pennsylvania ID# 86611
5510 Hobart Street
Pittsburgh, PA 15217

412-904-2222

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[April 12, Respondent sent Petitioner to HAPPI]

MATERIAL SAFETY DATA SHEET
For chemicals, coatings and related materials

DATE:	SUPERSEDES	PREPARED BY:
March 9, 1994	March 3, 1989	Mark Horton, (612) 496-6027

Manufacturer

NAME: ChemRex, Inc. ADDRESS: Contech Brands ADDRESS: 889 Valley Park Drive ADDRESS: Shakopee, MN ZIP CODE: 55379	EMERGENCY PHONE NUMBER DAY: (612)-496-6000 NIGHT: CHEMTREC (800)-424-9300 INFORMATION PHONE NUMBER (612)-496-6000

Distributor

NAME:
ADDRESS:
ADDRESS:
ADDRESS:
ADDRESS: PHONE:

Section I - Product

NUMBER: 79-182	HMIS Hazard Codes Health: 2 Moderate Flammability: 1 slight Reactivity: 0 Minimal Personal Protective Equipment: G
NAME: Non-flammable FORMICA® Brand Contact Adhesive CLASS: Adhesive CAS NUMBER: none - mix	

you need this form to fill out

NOTE: Preexisting respiratory or skin condition(s) may be aggravated by exposure. Acute and chronic liver disease and rhythm disorders of the heart may be aggravated by exposure.

NOTE TO PHYSICIAN: Never give adrenalin to a person overexposed to 1,1,1-trichloroethane.

CHRONIC OVEREXPOSURE INFORMATION:

1] This product contains diethylene ether [1,4-dioxane]. Repeated exposure to dioxane by skin contact or inhalation can lead to kidney and liver damage. IARC and NTP have listed dioxane as a suspect carcinogen.

2] No other known components of this product are listed as known or suspected carcinogens per NIOSH,NTP, IARC, or OSHA.

3) This product contains solvents. Reports associate repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage. Reports also indicate that solvents cause liver damage, kidney damage, and mucous membrane irritation. Be warned that intentional misuse of this product by deliberately inhaling the vapors and/or the contents [a process often called "sniffing"] may be harmful or fatal.

MEDICAL CONDITIONS GENERALLY AGGRAVATED BY EXPOSURE: Any pre-existing respiratory or skin condition.

EMERGENCY AND FIRST AID PROCEDURES:

EYES:	Flush the eyes with plenty of water for at least 15 minutes. If necessary, gently hold the eyelids open during the flush. Obtain immediate medical attention.
SKIN:	Remove contaminated clothing and shoes. Wash affected area(s) thoroughly with soap and water. If symptom persist, get medical attention.
INHALATION:	Move the victim into fresh air. If the victim has difficulty breathing, administer oxygen. Administer artificial respiration if the victim is not breathing. Obtain immediate medical attention.
INGESTION:	Obtain immediate medical attention. Do not induce vomiting. Should vomiting occur, be sure to keep victim's head below hips to avoid aspiration of vomitus into the lungs.

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[illegible] ription	Percent by Weight	C.A.S. Registry Number	LEL	[mm Hg at 20 deg C]
1,1,1-trichloroethane*	60-100	71-55-6	7	100
Diethylene ether*	1-5	123-91-1	2	35
Nitromethane	0.1-1	75-52-5	7	27
1,2-butylene oxide*	0.1-1	106-88-7	3	176
* Reportable under SARA Title 313, Section III				

Section III - Physical Data

Boiling Range:	>165 deg F	Freezing Point:	no data
Vapor Pressure:	100 mm Hg @ 77 deg F	Vapor Density:	Heavier than air
Specific Gravity:	1.31	H2O Soluble:	slight [<0.1 %]
Evaporation Rate(relative to n-butyl acetate)	Slower	% Volatile by Volume:	85-90
pH:	Not applicable	Odor Threshold:	no data
Appearance and Odor:	Amber medium syrup	sweetish odor	

Section IV - Fire and Explosion Hazard Data

FLASH POINT: (Method Used)	Does not flash[TCC, Setaflash]	EXPLOSIVE LIMITS: LEL (%V in air) UEL	7.5 15
AUTOIGNITION TEMP:	no data	METHOD:	N/A
OSHA FLAMMABILITY CLASSIFICATION		Not regulated	

PENDAD 800-631-6989
DEPOSITION EXHIBIT 4

45a

Non-flammable Formica® brand contact adhesive

Section IV - Fire and Explosion Hazard Data

EXTINGUISHING MEDIA:	Water Spray (Fog), Foam, Dry Chemical or Carbon Dioxide.		
SPECIAL FIRE FIGHTING PROCEDURES	Fire Fighters must wear self contained breathing apparatus or air masks.	Containers exposed to fire should be kept cool with water spray.	Water stream directed into fire may causing frothing and subsequent spread of fire.
UNUSUAL FIRE AND EXPLOSION HAZARDS:	Closed containers may explode due to build up of pressure when exposed to heat.	Thermal decomposition or combustion of product may generate irritating and/or toxic gases.	Remove sources of ignition.

Section V - Toxicological Information

Ingredient Material Description	PEL [mg/m3]	TLV STEL [mg/m3]	TLV[twa]		LD50 [mg/kg]		LC50 [ppm] Rat INHAL
			mg/m3	ppm	RAT [oral]	RABBIT [dermal]	
1,1,1-trichloroethane	350 ppm	450 ppm	N/A	350	No data	No data	No data
Diethylene ether	25 ppm*	N/A	N/A	25*	No data	7600	No data
nitromethane	100 ppm	Not listed	250	100	No data	No data	No data
1,2-butylene oxide	Not listed	Not listed	Not listed	Not listed	No data	No data	No data
	* Skin contact						

Section VI - Health Hazard Data and Emergency/first Aid Procedures

THRESHOLD LIMIT VALUES: See Section V

ACUTE OVEREXPOSURE INFORMATION

EYES: Severe irritant. May cause tearing, reddening of the eyes and reversible corneal injury.

SKIN: Moderate irritant. May cause dermatitis and allergic responses.

[illegible]

KEEP OUT OF REACH OF CHILDREN	USE ONLY WITH ADEQUATE VENTILATION

Section XI - Regulatory Data

VOC CONTENT: 229.8 g/L, excluding water and exempt compounds.

CALIFORNIA PROPOSITION 65:

This product contains diethylene ether [1,4-dioxane], a substance listed by the State of California as known to cause cancer.

TRANSPORTATION

	DOT	UN
HAZARD CLASS :	Poisonous material	Poisonous material
UN/NA NUMBER :	UN 2831	UN 2831
SHIPPING NAME:	1,1,1-trichloroethane solution	1,1,1-trichloroethane solution
PLACARD AT	1000	N/A
CLASS NUMBER :	6.1	AIR: 6.1 MARINE: 6.1
SUBSID. RISK :	N/A	AIR: N/A MARINE: N/A
PACKING GROUP:	III	AIR: III MARINE: III

REPORTING

CERCLA REPORTABLE QUANTITY: 1185 lbs. AS WASTE: None

SARA SECTION 304 EMERGENCY RESPONSE REPORTABLE QUANTITY: 1185 lbs

SARA SECTION 311/312 INVENTORY REPORTING (Y/N): Y

SARA SECTION 311/312 HAZARD CLASS(ES): Acute and chronic health hazard.

SARA SECTION 313 ROUTINE RELEASE REPORTING CHEMICALS: 1,1,1-trichloroethane, 84.4%; 1,4-dioxane, 2.2%, 1,2-butylene oxide, 0.4%

COMPONENTS ON TSCA INVENTORY (Y/N): Y

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Section VII - Reactivity Data

STABILITY: Stable

STABILITY CONDITIONS TO AVOID: Sources of ignition. Long term exposure to elevated temperatures.

INCOMPATIBILITY (MATERIALS TO AVOID CONTACT WITH): strong oxidants, strong bases or acids. Aluminum and/or zinc.

HAZARDOUS DECOMPOSITION PRODUCTS: Oxides of carbon, hydrogen and chlorine gas, other acrid and toxic fumes.

HAZARDOUS POLYMERIZATION:will not occur.

Section VII - Spill or Leak Procedures

STEPS FOR MATERIAL SPILLAGE:

Ventilate the area and remove all sources of ignition. Evacuate unnecessary personnel. Wipe up small spills with rags or towels. Put spent rags or towels in loosely covered containers in a well-ventilated area. Large spills should be handled carefully. Put on respiratory protection. Dike or impound spilled liquid. Cover the spill with absorbent compound [e.g., vermiculite, clay, or sand]. Use non-sparking tools to sweep or shovel into containers. Cover loosely and remove to a well-ventilated waste area. Repeat sorbent/sweep cycle until the spill has dried up. Rinse the spill area thoroughly with water. Flush the rinsings to the sanitary sewer or soak them up with absorbent material. Do not discharge undiluted product to the sanitary sewer. Do not discharge the product or cleanup wastes to lakes, streams, ponds, or sewer. Avoid contact with eyes and skin.

WASTE DISPOSAL METHODS:

Review all local, state, and federal regulations concerning health and pollution for appropriate disposal procedures. Do not incinerate closed containers.

Section IX - Special Protection Information

RESPIRATORY PROTECTION: Wear NIOSH/MSHA approved respiratory protection when the product is mixed or applied in a poorly ventilated area or if workplace levels of ingredients exceed the TLV. Follow applicable federal, state, and local regulations.

VENTILATION: Use local exhaust [e.g., open windows, fans] as needed to keep vapor/dust levels below recommended limits.

PROTECTIVE EQUIPMENT: Wear gloves [Natural rubber, supported PVA, or nitrile], eye goggles, and clean protective clothing to cover arms and legs and keep exposure to a minimum.

Section X - Special Precautions

HANDLING AND STORAGE PRECAUTIONS

DO NOT BREATHE VAPORS. DO NOT TAKE INTERNALLY

..... Non-flammable FORMICA® Brand Contact Adhesive , 79-182, Page 4

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Section XI - Regulatory Data

DISPOSAL

EPA RCRA WASTE CLASS: Not regulated

EPA RCRA WASTE NUMBER: Not regulated

CALIFORNIA LIST LAND BAN (Y/N): N

ABBREVIATIONS USED:

N/A = Information or data Not Available, NTP = National Toxicology Program,
IARC = International Agency for Research on Cancer, NIOSH = National Institute of Occupational Safety and Health,
ACGIH = American Conference of Governmental Industrial Hygienists, OSHA = Occupational Safety and Health Administration,
PEL = Permissible Exposure Limit (8-hr. TWA) (OSHA), TLV = Threshold Limit Value (8-hr. TWA) (ACGIH),
STEL = Short Term Exposure Limit (15-min TWA) (OSHA), C = Ceiling Value.

DISCLAIMER

This information is furnished without warranty, representation, or license of any kind, except that this information is accurate to the best of ChemRex's knowledge, or is obtained from sources believed by ChemRex to be accurate. No warranty is expressed or implied regarding the accuracy of this information or the results to be obtained from its use thereof. ChemRex assumes no responsibility for injuries proximately caused by use of the Material if reasonable safety procedures are not followed as stipulated in this Data Sheet. Additionally, ChemRex assumes no responsibility for injuries proximately caused by abnormal use of the Material even if reasonable safety procedures are followed. Buyer assumes the risk in its use of the Material.

REASON FOR REVISION: Complete review	REISSUE REQD: Y

accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

..1910.1200(a)(2)

(a)(2)

This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

9

OSHA Regulations (Standards - 29 CFR)
Hazard Communication. - 1910.1200

OSHA Regulations (Standards - 29 CFR) - Table of Contents

- **Standard Number:** 1910.1200
- **Standard Title:** Hazard Communication.
- **SubPart Number:** Z
- **SubPart Title:** Toxic and Hazardous Substances
- **Applicable Standard:** Applicable Standard:

Interpretation(s)

(a)

"Purpose."

(a)(1)

Complaint	075010371	03/01/1996	Yes

	Violation Summary					
	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	4			1		5
Current Violations				2		2
Initial Penalty	7000.00					7000.00
Current Penalty	500.00					500.00
FTA Amount						

Violation Items

	ID	Type	Standard	Issuance	Abate	Curr$	Init$	Fta$	Contest	Lastl
Deleted	1 01001A	Serious	19100178 P01	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
	2 01001B	Other	19100178 A06	04/02/1996	04/15/1996	0.00	0.00	0.00		I-Informal
Deleted	3 01002A	Serious	19101200 B04 II	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
Deleted	4 01002B	Serious	19101200 F05 I	04/02/1996	04/08/1996	0.00	0.00	0.00		I-Informal
Deleted	5 01003A	Serious	19100030 A03	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
	6 01003B	Serious	19100178 N11	04/02/1996	04/15/1996	500.00	0.00	0.00		I-Informal
	7 01004	Other	19100178 L	04/02/1996	05/31/1996	0.00	2500.00	0.00		I-Informal
	8 02001	Other	19101030 G02 VIII	04/02/1996	04/15/1996	0.00	0.00	0.00		

U.S. Department of Labor
Occupational Safety & Health Administration

Establishment Search Inspection Detail – Public View

Definitions

Inspection: 122677255 - Cf Motor Freight, Inc.

Inspection Information - Office: Pittsburgh
Nr: 122677255 Report ID: 0317500 Open: 03/06/1996
Cf Motor Freight, Inc. 73 Mccandless Avenue Pittsburgh , PA 15201 Union Status: Union SIC: 4231/Trucking Terminal Facilities
Inspection Type: Complaint Scope: Partial Advance Notice: N Ownership: Private Safety/Health: Health Close Conference: 03/19/1996

12

Citation 1 Item 2b Type of Violation: Serious

29 CFR 1910.1200(f)(3): Chemical manufacturers, importers, distributors did not ensure that each container of hazardous chemicals leaving the workplace was labeled, tagged or marked with the identity of the hazardous chemical(s) contained therein:

a) Dock Area: The employer transferred damaged hazardous chemical products to 55 gallon drum without labeling the drum for it contents according to 1910.1200(f)(1).

Leak

Date By Which Violation Must be Abated: 04/08/96

13

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 122677255
Inspection Dates: 03/06/96 - 03/19/96
Issuance Date: 04/02/96

Citation and Notification of Penalty

Company Name: C & F Motor Freight Inc.
Inspection Site: 73 McCandless Avenue, Pittsburgh, PA 15201

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

Citation 1 Item 2a Type of Violation: Serious

29 CFR 1910.1200(b)(4)(ii): In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use, the employer did not maintain copies of any material safety data sheets that were received with incoming shipments of the sealed containers of hazardous chemicals:

a) Facility: Employer did not maintain copies of the Material Safety Data Sheets for all chemicals that are received into the dock area such as glues containing 111-trichloroethane, cleaners containing sodium hydroxide or transporting hazardous chemicals from local chemical companies.

Date By Which Violation Must be Abated: 04/15/96

The Hazardous Substance Survey Form (HSSF) provides an inventory of the hazardous substances found in the workplace during the prior calendar year. All employers must complete a workplace HSSF annually. Public sector employers and private sector employers not covered by OSHA must post the HSSF prominently in the workplace and must provide a copy to any employee upon request.

Work Area List:

The Work Area List names the hazardous substances used or produced in a specific work area in the workplace. Public sector employers and private sector employers not covered by the OSHA Hazard Communication Standard must update a Work Area List at least annually, must provide a copy to any employee of the work area upon request, and must offer a copy to any employee newly assigned to that work area.

Material Safety Data Sheet:

The Material Safety Data Sheet (MSDS) provides detailed information about a hazardous substance. In public sector workplaces and private sector workplaces not covered by the OSHA Hazard Communication Standard, an MSDS must be accessible in the work area where the hazardous substance it describes is used. MSDSs must be readily available to employees without the intervention or permission of management or supervisors, and any employee may obtain and examine an MSDS for any hazardous substance in the workplace. If an employee's request to obtain a copy of an MSDS is made to the employer in writing and, after five working days from the date the request is made, the employer fails to furnish the employee with an MSDS in the employer's possession or fails to provide the employee with proof of the employer's effort to obtain the requested MSDS from the manufacturer, importer, supplier or distributor and from the Department of Labor and Industry, the requesting employee may refuse to work with the substance.

PSF-4 REV 4-04

contents.

Health and Exposure Records:

Public sector employers and private sector employers not covered by the OSHA Hazard Communication Standard must maintain and allow employee access to records of employee chemical exposure to the extent required by OSHA (under 29 CFR 1910.1200) or by the Mine Safety Health Administration (under 30 CFR 70.210 and 71.210).

Non-discrimination:

If a public sector employee or an employee of a private sector workplace not covered by the OSHA Hazard Communication Standard believes that he or she has been discharged, disciplined or discriminated against by an employer for exercising his or her rights granted under the Pennsylvania Worker and Community Right to Know Act, that employee has 180 days from the date of the alleged violation to file a written complaint with the Department of Labor and Industry, Bureau of PENNSAFE.

Commonwealth of Pennsylvania
Edward G. Rendell, Governor

Department of Labor and Industry
Stephen M. Schmerin, Secretary

PENNSYLVANIA WORKER AND COMMUNITY RIGHT TO KNOW ACT

EMPLOYEE WORKPLACE NOTICE

PUBLIC SECTOR

The Pennsylvania Worker and Community Right to Know Act requires that information about hazardous substances in the workplace and in the environment is available to public sector employees and employees of private sector workplaces not covered by the Federal Occupational Safety and Health Administration (OSHA) Hazard Communication Standard and to all persons living or working in the state. Employee rights listed below are further defined in the Worker and Community Right to Know Act (P.L. 734, No. 159) and Regulations. For additional information, contact the Department of Labor and Industry, Bureau of PENNSAFE, Room 155-E, Seventh and Forster Streets, Harrisburg, Pennsylvania 17120; (717) 783-2071; FAX (717) 783-5099; li-pennsafe@state.pa.us (e-mail).

Employee Workplace Notice:

Public sector employers (including state and local government agencies and public schools and public universities) and private sector employers not covered by the OSHA Hazard Communication Standard must post this notice informing employees of their rights under the law. This notice must be posted prominently in the workplace at a location where employee notices are normally posted.

Training:

Public sector employers and private sector employers not covered by the OSHA Hazard Communication Standard must provide an annual education and training program to employees exposed to hazardous substances. The training program may be presented either in written form or in training

Environmental Hazard Survey Form:

The Environmental Hazard Survey Form (EHSF) provides information about any environmental hazards emitted, discharged or disposed of from the workplace. All employers are required to complete an EHSF when and if requested to do so by the Department of Labor and Industry. If an EHSF has been completed by a public sector employer or a private sector employer not covered by the OSHA Hazard Communication Standard, a copy must be provided to any employee upon request.

Labeling:

All containers and ports of pipelines of hazardous and non-hazardous substances in public sector workplaces and private sector workplaces not covered by the OSHA Hazard Communication Standard must be properly labeled. Employers must ensure that each label, sign, placard or other

I am writing with regard to your Petition for Allowance of Appeal to the Supreme Court in the above-referenced matter. We have indulged your client's appeal in this matter for quite some time. My client has now asked our office to take more aggressive steps to bring this matter to a conclusion. The first step would include a request for the imposition of counsel fees pursuant to Pennsylvania Rules of Appellant Procedure 2744.

As a matter of law, this is a frivolous appeal. As you know, the Claimant bears the burden of proof on a Claim Petition. Claimant is required to meet that burden by presentation of unequivocal expert medical testimony. The WCJ found that Claimant's medical expert submitted in the original petition, Dr. Nellhaus, was equivocal a matter of law. October 15, 1997, WC Op., p. 3. The Judge's credibility determinations cannot be overturned on appeal.

My client has expressed great concern over the baseless allegations of fraud. If you persist in those allegations of fraud, my client is requesting that we file a report to the Disciplinary Board for violation of Rule 3.1, which requires counsel to assert a genuine issue in good faith. Counsel will not raise an issue unless there is a basis for doing so that is not frivolous. Further, this was a Claim Petition for workers' compensation benefits, and allegations of fraud are not applicable in this context.

---

† Certified as a Civil Trial Advocate by the National Board of Trial Advocacy
A Pennsylvania Supreme Court Accredited Agency

Farrell & Ricci, P.C.
Attorneys and Counselors at Law
4423 North Front Street
Harrisburg, PA 17110

Michael A. Farrell
Joseph A. Ricci †
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Daniel J. Gallagher
Stephen R. Harris
Gregory D. Geiss
Thomas M. Fraticelli
Lawrence F. Barone

**also admitted in New Jersey.*

Telephone: (717) 230-9201
Fax: (717) 230-9202
E-mail: sharris@frpclaw.com

April 29, 2004

18

Mary Ellen Chajkowski, Esquire
1000 Grandview Ave, #201
Pittsburgh, PA 15211

Re: **Steven Smith v. Consolidated Freightways**
SSN: 192-28-2964
Bureau Claim No. 658011
Our File No: CON-233

8. Have you returned to work? (A) (a) If so, on what date? _____ (b) If not, when do you expect to return to work? _____

IF PATIENT IS A DEPENDENT, COMPLETE LINES 9

9. Dependent's description:
   (a) Name _____ Relationship _____
   (b) Date of birth _____ Sex _____ Single ☐ Married ☐
   (c) Attending school full time? _____ Social Security No. _____
   (d) Was Dependent injured during course of any employment? _____

10. Are any other group benefits provided to you or your dependents for this disability? Yes ☐ No ☒
    (a) If your answer is "YES", please give the name of the Insurance Plan or Company _____

I hereby certify that the foregoing statements, including any accompanying statements are to the best of my knowledge and belief true, correct and complete, and I agree to refund any overpayment that may be made to me on this claim. I hereby authorize any physician, or any hospital, to furnish and disclose all known facts concerning this disability to the Fund Office. A copy or photocopy of this authorization shall be as valid as the original.

Date this Claim Form Signed 5-10-96

Employee's Signature _____ X

EMPLOYEE SIGN HERE

LOSS OF TIME SECTION – ACCIDENT OR SICKNESS

COMPLETE ONLY WHEN EMPLOYEE IS APPLYING FOR WEEKLY BENEFITS. THIS SECTION MUST BE COMPLETED BY EMPLOYER.

Date last worked 4-11-96 Has this claim been considered with Workmen's Compensation coverage? _____

Date returned to work _____ If "NO," what is present status? _____

_____ _____ _____

Date Signed (Signature of Employer) Phone #

THE ATTENDING PHYSICIAN MUST COMPLETE THE REVERSE SIDE OF THIS FORM
ITEMIZED BILLS MUST ACCOMPANY CLAIMS

STATEMENT OF CLAIM

RETURN THIS COMPLETED FORM TO:

TRUSTEES OF WESTERN PENNSYLVANIA TEAMSTERS & MOTOR CARRIERS WELFARE FUND

50 Penn Circle W. Pittsburgh, Pennsylvania 15206 Telephone: 363-2700

[redacted] EXHIBIT G

PENGAD 800-631-6989

IMPORTANT — Claims MUST Be Filed within 90 Days

Except: Loss of Time claims which must be filed within 20 days.

EMPLOYER COMPLETES IN ALL CASES Local Union No. 249

S.S. No. 192-25-2964

1. Name of Employee STEVEN SMITH Date of Birth
2. Home Address 843 LINDENWOOD DR PGH PA 15234 (No. and Street / City / State / Zone) Married ☐ Single ☐
3. Employed by CONSOLIDATED FREIGHTWAYS Occupation TRUCK DRIVER
4. Name of Spouse LYNDA R SMITH III Social Security No. [redacted]

Spouse Employed Yes ☐ No ☒ Occupation

Company Name Company Address

Group Hospitalization Group ID #

5. IF AN ACCIDENT WAS INVOLVED, ANSWER THE FOLLOWING:

(a) When did the accident happen? Date 2-28 19 91 at (hour) 530 a.m. / p.m.

(b) Was the injured person at work when the accident happened? Yes (Yes or No)

(c) Give a brief description of the accident Unloaded reefer

IF PATIENT IS THE EMPLOYEE, ALSO COMPLETE LINES 6, 7 AND 8

6. On what date were you first totally disabled by the sickness or injury? 4-12-91
7. On what date were you first treated by a physician? 4-12-91

On what date did you last work? 4-11-91

by Mr. Smith regarding his injury on February 28, 1996, as well as requests for pay and disbursements.

The Welfare Fund is a self-insured ERISA benefit plan, and all benefits paid directly reduce the assets of the Plan. To the extent some other party is obligated to pay for losses which the Welfare Fund paid on behalf of its participants, the Welfare Fund has subrogation rights, and it is the Fund's policy to pursue reimbursement for benefits paid.

Enclosed please find the records which you have requested. These records include a Subrogation Acknowledgment form signed by Steven Smith, in which he "agree[d] to reimburse Welfare Fund for benefits paid by the Welfare Fund from any recovery of money by settlement or verdict as a result of a claim against any person, insurance company, firm or corporation, as a result of the accident."

The enclosed records indicate that the Welfare Fund has a subrogation lien of $6,791.59, based on payments it made of $3,820.21 for Mr. Smith's medical benefits and $2,971.38 for his loss of time benefit. The medical benefits payment total of $3,820.21 includes the amounts set forth on the enclosed Accident Lien Report from Highmark Blue Cross Blue Shield and the Welfare Fund's Claims History Inquiry. The Accident Lien Report indicates that $1,754.61 was paid by the Welfare Fund on behalf of Mr. Smith, and the Claims History Inquiry lists various payments made by the Welfare Fund which amount to $2,065.60.

LAW OFFICES

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C.

1450 TWO CHATHAM CENTER

PITTSBURGH, PA 15219-3427

(412) 765-1600

FACSIMILE

(412) 261-3783

E-MAIL

wsmos@wsmoslaw.com

HENRY M. WICK, JR.
CHARLES J. STREIFF
CARL F. MEYER
DAVID M. O'BOYLE
VINCENT P. SZELIGO
BRENDAN R. DELANEY

May 31, 2005

Re: Western Pennsylvania Teamsters and Employers Welfare Fund - Steven Smith
Our File No. 341.239.96

Mary Ellen Chajkowski, Esq.
5510 Hobart Street
Pittsburgh, PA 15217

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Dear Ms. Chajkowski:

My name is Brendan Delaney, and I am an attorney representing the Western Pennsylvania Teamsters and Employers Welfare Fund ("Welfare Fund"). I am writing in response to the letter you sent to the Trustees of the Western Pennsylvania Teamsters & Motor Carriers Welfare Fund (now known as the Western Pennsylvania Teamsters and Employers Welfare Fund), dated May 19, 2005. In the letter, you stated that you represent Steven Smith, and requested copies of documents signed

BRD/lk
Enclosures
cc: Welfare Fund Office

73

W:\BRD\2005\175-341.239.96.wpd

On the Claims History Inquiry, the Loss of Time payments made by the Welfare Fund have been marked with a check, and the medical payments made by the Fund have been marked with a star. For these medical payments, the total paid by the Welfare Fund includes the amounts found in the last three columns, "Maj. Med.," "Basic" and "Supp. Acc."

This letter, along with the Subrogation Acknowledgment form signed by Mr. Smith, will serve as notice to you and Mr. Smith that the Welfare Fund has a subrogation lien of $6,791.59, and that the Welfare Fund has the right of subrogation for any amounts received by Mr. Smith related to his injury on February 28, 1996. Let me know if you need anything else and please keep me updated on the status of the case.

74

Very truly yours,

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.

Brendan Delaney

I have not had any trouble with my knee.

8 05 SS

. Do you expect to receive medical care? Provide names and addresses of all medical providers

. Have you had similar complaints or injuries in the past? If so, when? Who was the medical provider? no

EXHIBIT
10
PEIGLER-Exhibits, N. J.

he above information is true and correct to the best of my knowledge.

mployee Signature Steven L Smith Date 2-29-96 SS

I hereby authorize any physician, hospital, or agency to furnish information to the presenter of this document. My medical records, reports, or a copy of this document may also be used with my permission. This authorization remains valid until revoked by me.

Steven L Smith 2-29-96
Signature Date

omplete and send this
rm within 48 hours to:

Workers' Compensation Dept. (WCD)
P.O. Box 4670
Portland, OR 97208-4670

PERSONNEL FILE COPY

Employee Name Steven Smith 565 @ 3223 State PA

Component/Location Pgh PA Social Security No. 192-28-2964

Date of Injury/Illness 2-28-96 Hour 1st Shift @ C+C Tank

PLEASE ANSWER ALL QUESTIONS

1. Location of accident, e.g., door number, equipment number, address of customer Tank # 17 1030 C+C Lumberton Mississippi Unknown at this time

2. Names of witnesses or other people involved Gary at West Penn Power.

3. To whom did you repprt the incident? When? Frank Dietrich @ 11:00 Am

4. Description and weight of material involved Sealing chimney of Power

5. Describe what happened. How did accident occur? I was unaware that I was breathing fumes until I began unloading Tank of West Penn

6. What is the nature of your injury? Describe the body parts and nature of your complaints Nauseau; Lightheaded

L.1 HG III

DID INJURY OR DISEASE OCCUR BECAUSE OF →	32. MECHANICAL DEFECT ☒ NO ☐ YES (DESCRIBE ABOVE)	33. UNSAFE ACT ☒ NO ☐ YES (DESCRIBE ABOVE)	33. CHECK IF AMPUTATION ☐	LOCATION / INSURANCE / PAYMENT LA / COMPENSATION R
INJURY OR DISEASE	34. NATURE AND LOCATION OF INJURY OR DISEASE (DESCRIBE FULLY, INCLUDING PARTS OF BODY AFFECTED.) Contusions of Throat Muscles, Lightheadedness			
	37. ATTENDING PHYSICIAN AND ADDRESS (IF HOSPITAL INVOLVED- INDICATE)			

EXHIBIT B

RETAIN THIS COPY AS EMPLOYER RECORD OF INJURY OR DISEASE

EXHIBIT 11

WORKMEN'S COMPENSATION INSURANCE COMPANY AND ADDRESS
(Preprint or Stamp-Include Bureau Code)

CONSOLIDATED FREIGHTWAYS, INC.
WORKERS' COMPENSATION DEPARTMENT
POST OFFICE BOX 4670
PORTLAND, OREGON 97208
PHONE (503) 226-4692 • EXT. 2070

BUREAU CODE 721

Distributed by Albert L. Allen Company, Inc.
Workmen's Compensation Service
P.O. Box 1651, Harrisburg, Pa. 17105

6115-40 (7/85)

(EMPLOYER COPY)

BUREAU OF WORKERS' COMPENSATION
3607 DERRY STREET
HARRISBURG, PA. 17111
TELEPHONE 783-5421
LONG DISTANCE (TOLL FREE) 800-482-2383

OF OCCUPATIONAL INJURY OR DISEASE

EMPLOYER'S UC REPORTING NUMBER

INSURANCE POLICY NUMBER

DATES

1. DATE OF REPORT	2. DATE OF INJURY AND TIME	3. NORMAL STARTING TIME	4. IF EMPLOYEE BACK TO WORK GIVE DATE:	5. AT SAME WAGE?	DO NOT USE THIS COLU
2/28/96	2/28/96 1100 ☑ AM ☐ PM	0830 ☑ AM ☐ PM		YES ☑ NO ☐	

6. IF FATAL INJURY, GIVE DATE OF DEATH	7. DATE EMPLOYER KNEW OF INJURY	8. DATE DISABILITY BEGAN	9. LAST FULL DAY PAID - DATE	DATE
N/A	2-28-96			

EMPLOYER

10. EMPLOYER	11. PERSON MAKING OUT THIS REPORT	HOURS WO
CF MOTORFREIGHT	SAM SIANCATO	

12. ADDRESS - INCLUDE COUNTY AND ZIP CODE	13. EMPLOYER TELEPHONE NUMBER (INCLUDE AREA CODE)	REPORT L
73 McFarlane Ave Pittsburgh PA 15201 Allegheny Co	412-782-0071	

14. MAILING ADDRESS - IF DIFFERENT THAN ABOVE	15. NATURE OF BUSINESS - TYPE OF MFG., TRADE, CONSTRUCTION, SERVICE, ETC.	DISABILI
	FREIGHT TRUCKING	

EMPLOYEE

16. EMPLOYEE: FIRST	MIDDLE	LAST	17. NAME ☒ MALE ☐ FEMALE	18. EMPLOYEE TELEPHONE NUMBER (INCLUDE AREA CODE)	INDUSTR
STEVEN		Smith		412-343-7454	

19. ADDRESS - INCLUDE COUNTY AND ZIP CODE	20. MARRIED	21. NUMBER OF CHILDREN UNDER 18	SEX
843 Lindenwood Dr Pittsburgh PA 15234	YES ☒ NO ☐	0	

22. DATE OF BIRTH	23. AGE	24. IF UNDER 18, CERTIFICATE NUMBER	25. OCCUPATION FOR WHICH ISSUED	
4/28/37	60		TRUCK DRIVER	

26. OCCUPATION	27. DEPARTMENT OR DIVISION REGULARLY EMPLOYED	28. HOW LONG EMPLOYED	AGE
Same	CFMF	30 yrs	

OCCURRENCE

29. PLACE OF INJURY: EMPLOYER'S PREMISES	30. IF NO - EXACT LOCATION - STREET, CITY, COUNTY, AND STATE	OCCUPATIC
YES ☐ NO ☒	P+C Lumber Tarrs PA Fayette (Westmoreland) Co	

31. WHAT WAS EMPLOYEE DOING WHEN INJURED? (BE SPECIFIC. IF USING TOOLS OR EQUIPMENT OR HANDLING MATERIAL - NAME THEM AND TELL WHAT HE WAS DOING WITH THEM.)

Backed into Dock to make Delivery of Freight. Opened Trailer Door. Breathed Fumes.

32. HOW DID INJURY OCCUR? (DESCRIBE FULLY THE EVENTS WHICH RESULTED IN INJURY OR DISEASE. TELL WHAT HAPPENED AND HOW IT HAPPENED. NAME ANY OBJECTS OR SUBSTANCES INVOLVED AND TELL HOW THEY WERE INVOLVED. GIVE FULL DETAILS ON ALL FACTORS WHICH LED OR CONTRIBUTED TO INJURY OR DISEASE.)

Breathing Fumes, Formica Adhesive Trichloroethane Solution.

COUNTY
ACCIDENT TI
OCCUPATIONAL D
UNSAFE AC
MECHANICAL DE
NATURE

THIS REPORT MUST BE CO

"LETED BY TYPEWRITER

11. SHIPPING PAPER/WAYBILL IDENTIFICATION NO. CF PRO# 384-048851

IV. HAZARDOUS MATERIAL(S) SPILLED (NOTE: REFERENCE 49 CFR SECTION 172.101.)

12. PROPER SHIPPING NAME 172.101 col. 2	13. CHEMICAL/TRADE NAME	14. HAZARD CLASS NUMBER 172.101 col. 3	15. IDENTIFICATION NUMBER (e.g. UN 2784, NA 2020) 172.101 col. 4
Formica Adhesive	Trichloroethane Solution	6.1	UN 2831

16. IS MATERIAL A HAZARDOUS SUBSTANCE? VERIFY 172.101 APPENDIX ☐ YES ☒ NO

17. WAS THE REPORTABLE QUANTITY MET? VERIFY 172.101 APPENDIX A OR B ☐ YES ☒ NO

V. CONSEQUENCES OF INCIDENTS, DUE TO THE HAZARDOUS MATERIAL

18. ESTIMATED QUANTITY HAZARDOUS MATERIAL RELEASED (Include units of measurement)	19. FATALITIES	20. HOSPITALIZED INJURIES	21. NONHOSPITALIZED INJURIES
Appox. 5 OZ	None	None	1

22. NUMBER OF PEOPLE EVACUATED

23. ESTIMATED DOLLAR AMOUNT OF LOSS AND/OR PROPERTY DAMAGE, INCLUDING COST OF DECONTAMINATION OR CLEANUP (Round off in dollars)

A. PRODUCT LOSS	B. CARRIER DAMAGE	C. PUBLIC/PRIVATE PROPERTY DAMAGE	D. DECONTAMINATION/ CLEANUP	E. OTHER
$10.00	None	None	None	N/A

24. CONSEQUENCES ASSOCIATED WITH THE INCIDENT:
☐ SPILLAGE ☐ FIRE ☐ EXPLOSION ☒ VAPOR (Gas) DISPERSION ☐ ENVIRONMENTAL DAMAGE ☐ MATERIAL ENTERED WATERWAY/SEWER ☐ NONE ☐ OTHER:

VI. TRANSPORT ENVIRONMENT

25. INDICATE TYPE(S) OF VEHICLE(S) INVOLVED:
☐ TANK CAR ☐ RAIL CAR ☐ TOFC/COFC ☐ CARGO TANK ☐ AIRCRAFT ☒ VAN TRUCK/TRAILER ☐ NONE ☐ FLAT BED TRUCK/TRAILER ☐ SHIP ☐ OTHER: _____

26. TRANSPORTATION PHASE DURING WHICH INCIDENT OCCURRED OR WAS DISCOVERED:
☐ EN ROUTE BETWEEN ORIGIN/DESTINATION ☐ LOADING ☒ UNLOADING ☐ TEMPORARY STORAGE/TERMINAL

27. LAND USE AT INCIDENT SITE: ☐ INDUSTRIAL ☒ COMMERCIAL ☐ RESIDENTIAL ☐ AGRICULTURAL ☐ UNDEVELOPED

28. COMMUNITY TYPE AT SITE: ☐ URBAN ☒ SUBURBAN ☐ RURAL

29. WAS THE SPILL THE RESULT OF A VEHICLE ACCIDENT/DERAILMENT? ☐ YES ☒ NO
IF YES AND APPLICABLE, ANSWER PARTS A THRU C.

A. ESTIMATED SPEED:	B. HIGHWAY TYPE:	C. TOTAL NUMBER OF LANES:
Parked	☐ DIVIDED/LIMITED ACCESS N/A ☐ UNDIVIDED	☐ ONE ☐ THREE N/A ☐ TWO ☐ FOUR OR MORE

SPA

FORM DOT F 5800.1 (Rev. 6/89) Supersedes DOT F 5800.1 (10.70) (9/1/76) THIS FORM MAY BE REPRODUCED

BL

08529-37 (6/97) Litho U.S.A.

THIS REPORT MUST BE COMPLETED BY TYPEWRITER

DEPARTMENT OF TRANSPORTATION
HAZARDOUS MATERIALS INCIDENT REPORT

Form Approved OMB No. 2137 0039

INSTRUCTIONS: Submit this report in duplicate to the Information Systems Manager, Office of Hazardous Materials Transportation, DHM-63, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590. If space provided for any item is inadequate, complete that item under Section IX, keying to the entry number being completed. Copies of this form, in limited quantities, may be obtained from the Information Systems Manager, Office of Hazardous Materials Transportation. Additional copies in this prescribed format may be reproduced and used, if on the same size and kind of paper.

I. MODE, DATE, AND LOCATION OF INCIDENT

1. MODE OF TRANSPORTATION: ☐ AIR ☒ HIGHWAY ☐ RAIL ☐ WATER ☐ OTHER: _____

2. DATE AND TIME OF INCIDENT: (Use Military Time, e.g. 8:30am = 0830, noon = 1200, 6pm = 1800, midnight = 2400.) DATE: 2 / 28 / 1996 TIME: 11 am

3. LOCATION OF INCIDENT (Include airport name in ROUTE/STREET if incident occurs at an airport.)
CITY: Tarrs STATE: PA
COUNTY: Fayette ROUTE/STREET: _____

II. DESCRIPTION OF CARRIER, COMPANY, OR INDIVIDUAL REPORTING

4. FULL NAME
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE

5. ADDRESS (Principal place of business)
175 LINFIELD DRIVE
MENLO PARK, CA 94025-3799

6. LIST YOUR OMC MOTOR CARRIER CENSUS NUMBER, REPORTING RAILROAD ALPHABETIC CODE, MERCHANT VESSEL NAME AND ID NUMBER OR OTHER REPORTING CODE OR NUMBER. MC 42487

III. SHIPMENT INFORMATION (From Shipping Paper or Packaging)

7. SHIPPER NAME AND ADDRESS (Principal place of business)
Chemrex Inc.
Concord & Main
Mattawan MI 49071

8. CONSIGNEE NAME AND ADDRESS (Principal place of business)
O.C. Cluss
South Pennsylvania Ave.
Uniontown, PA 15401

9. ORIGIN ADDRESS (If different from Shipper address)
Same

10. DESTINATION ADDRESS (If different from Consignee address)
Same

MPLETED BY TYPEWRITER.

THIS REPORT MUST BE COMI

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a. ☐ PUNCTURED	a. ☐ END, FORWARD	a. ☐
b. ☐ CRACKED	b. ☐ END, REAR	b. ☐ FITTING/VALVE
c. ☐ BURST/INTERNAL PRESSURE	c. ☐ SIDE, RIGHT	c. ☐ CLOSURE
d. ☐ RIPPED	d. ☐ SIDE, LEFT	d. ☐ CHIME
e. ☒ CRUSHED	e. ☒ TOP	e. ☐ WELD/SEAM
f. ☐ RUBBED/ABRADED	f. ☐ BOTTOM	f. ☐ HOSE/PIPING
g. ☐ RUPTURED	g. ☐ CENTER	g. ☐ INNER LINER
h. ☐ OTHER:	h. ☐ OTHER:	h. ☒ OTHER: Lid Popped

IX. DESCRIPTION OF EVENTS: Describe the sequence of events that led to incident, action taken at time discovered, and action taken to prevent future incidents. Include any recommendations to improve packaging, handling, or transportation of hazardous materials. Photographs and diagrams should be submitted when necessary for clarification. ATTACH A COPY OF THE HAZARDOUS WASTE MANIFEST FOR INCIDENTS INVOLVING HAZARDOUS WASTE. Continue on additional sheets if necessary.

2- 1 Gallon cans were placed on trailer that had lids that were not secured due to damage in transit. These were inside a box and shrink wrap was placed around the box. While driver was enroute to make first delivery of the day, appox 5 oz of this material splashed ont inside of box.

46. NAME OF PERSON RESPONSIBLE FOR PREPARING REPORT	47. SIGNATURE	
Sam Stancato		
48. TITLE OF PERSON RESPONSIBLE FOR PREPARING REPORT	49. TELEPHONE NUMBER (Area Code)	50. DATE REPORT SIGNED
Supervisor	412-728-0471	3-1-96

SEND TWO COPIES AND ONE ORIGINAL TO VMS, MENLO PARK

VII. PACKAGING INFORMATION: If the package is overpacked (consists of several packages, e.g. glass jars within a fiberboard box), begin with Column A for information on the innermost package.

ITEM		A	B	C
30. TYPE OF PACKAGING, INCLUDING INNER RECEPTACLES (e.g. Steel drum, tank car)		Fiberboard BX/ 1 Gal Pail		
31. CAPACITY OR WEIGHT PER UNIT PACKAGE (e.g. 55 gallons, 65 lbs.)		1 Gallon		
32. NUMBER OF PACKAGES OF SAME TYPE WHICH FAILED IN IDENTICAL MANNER		2		
33. NUMBER OF PACKAGES OF SAME TYPE IN SHIPMENT		12		
34. PACKAGE SPECIFICATION IDENTIFICATION (3.g. DOT 17E, DOT 105A100, UN 1A1 or none)		UN2831		
35. ANY OTHER PACKAGING MARKINGS (e.g. STC, 16/18-55-88, Y1.4/150/87)		Directional		
36. NAME AND ADDRESS, SYMBOL OR REGISTRATION NUMBER OF PACKAGING MANUFACTURER		Unk		
37. SERIAL NUMBER OF CYLINDERS, PORTABLE TANKS, CARGO TANKS, TANK CARS		N/A		
38. TYPE OF LABELING OR PLACARDING APPLIED		6.1		
39. IF RECONDITIONED OR REQUALIFIED	A. REGISTRATION NUMBER OR SYMBOL			
	B. DATE OF LAST TEST OR INSPECTION			
40. EXEMPTION/APPROVAL/COMPETENT AUTHORITY NUMBER, IF APPLICABLE (e.g. DOT E-1012)				

VIII. DESCRIPTION OF PACKAGING FAILURE: Check all applicable boxes for the package(s) identified above.

41. ACTION CONTRIBUTION TO PACKAGING FAILURE

	A	B	C		A	B	C	
a.	☐	☐	☐	TRANSPORT VEHICLE COLLISION	j.	☐	☐	☐	CORROSION
b.	☐	☐	☐	TRANSPORT VEHICLE OVERTURN	k.	☐	☐	☐	METAL FATIGUE
c.	☐	☐	☐	OVERLOADING/OVERFILLING	l.	☐	☐	☐	FRICTION/RUBBING
d.	☐	☐	☐	LOOSE FITTINGS, VALVES	m.	☐	☐	☐	FIRE/HEAT
e.	☐	☐	☐	DEFECTIVE FITTINGS, VALVES	n.	☐	☐	☐	FREEZING
f.	☐	☐	☐	DROPPED	o.	☐	☐	☐	VENTING
g.	☒	☐	☐	STRUCK/RAMMED	p.	☐	☐	☐	VANDALISM
h.	☐	☐	☐	IMPROPER LOADING	q.	☐	☐	☐	INCOMPATIBLE MATERIALS
i.	☐	☐	☐	IMPROPER BLOCKING	r.	☐	☐	☐	OTHER: _____

42. OBJECT CAUSING FAILURE

	A	B	C	
a.	☒	☐	☐	OTHER FREIGHT
b.	☐	☐	☐	FORK LIFT
c.	☐	☐	☐	NAIL/PROTRUSION
d.	☐	☐	☐	OTHER TRANSPORT VEHICLE
e.	☐	☐	☐	WATER/OTHER LIQUID
f.	☐	☐	☐	GROUND/FLOOR/ROADWAY
g.	☐	☐	☐	ROADSIDE OBSTACLE
h.	☐	☐	☐	NONE
i.	☐	☐	☐	OTHER: _____

43. HOW PACKAGE(S) FAILED

A	B	C
—	—	—

44. PACKAGE AREA THAT FAILED

A	B	C	
☐	☐	☐	TOP, FORWARD

45. WHAT FAILED ON PACKAGE(S)

A	B	C	
☐	☐	☐	BASIC PACKAGE MATERIAL

82

Safety/Health: Health Close Conference: 06/19/1996

Close Case: 06/19/1996

Related Activity: Type	ID	Date	Safety	Health
Complaint	075010371	03/01/1996	Yes	

	Violation Summary					
	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	4			1		5
Current Violations				2		2
Initial Penalty	7000.00					7000.00
Current Penalty	500.00					500.00
FTA Amount						

83

Violation Items

	ID	Type	Standard	Issuance	Abate	Curr$	Init$	Fta$	Contest	Lastl
Deleted	1 01001A	Serious	19100178 P01	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
	2 01001B	Other	19100178 A06	04/02/1996	04/15/1996	0.00	0.00	0.00		I-Informal
Deleted	3 01002A	Serious	19101200 B04 II	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
Deleted	4 01002B	Serious	19101200 F05 I	04/02/1996	04/08/1996	0.00	0.00	0.00		I-Informal
Deleted	5 01003A	Serious	19100030 A03	04/02/1996	04/15/1996	1500.00	1500.00	0.00		I-Informal
	6 01003B	Serious	19100178 N11	04/02/1996	04/15/1996	500.00	0.00	0.00		I-Informal
	7 01004	Other	19100178 L	04/02/1996	05/31/1996	0.00	2500.00	0.00		I-Informal
	8 02001	Other	19101030 G02 VIII	04/02/1996	04/15/1996	0.00	0.00	0.00		

3705040124

U.S. Department of Labor
Occupational Safety & Health Administration

www.osha.gov [skip navigational links] Search | Advanced Search | A-Z

Establishment Search Inspection Detail -- Public View

Settlement sheet

Definitions

Inspection: 122677255 - Cf Motor Freight, Inc.

Inspection Information - Office: Pittsburgh
Nr: 122677255 Report ID: 0317500 Open: 03/06/1996
Cf Motor Freight, Inc. 73 Mccandless Avenue Pittsburgh , PA 15201 Union Status: Union SIC: 4231/Trucking Terminal Facilities
Inspection Type: Complaint Scope: Partial Advance Notice: N Ownership: Private Saf ty/H alth: H alth Close Conference: 03/19/1996

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Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

APPENDIX III

No. 05-4

In The

Supreme Court of the United States

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

On Petition for Rehearing
To the Supreme Court of the United States

Petition for Rehearing

Mary Ellen Chajkowski, Esq.
Petitioner's Counsel of Record
Pennsylvania ID# 86611
5510 Hobart Street
Pittsburgh, PA 15217

412-904-2222

APPENDIX II
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October 26,1996, Respondent's Expert Report.....145

November 13, 1996, Hearing Transcript 133

ORDER [*See* Appendix I – p.11]
AND NOW, this 15th day of October,1997,
the claimant's claim petition is dismissed.
No items in the bill of costs are payable.
No attorney fees are payable.
/s/Kathleen Vallely, Workers' Compensation Judge.

October 29, 1997, Petitioner's Appeal from Order.....95

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4. ☐ Although an injury took place, the employee is not disabled as a result of this injury within the meaning of the Workmen's Compensation Act.

5. ☐ The employee did not give notice of his/her injury or disease to the employer within 120 days within the meaning of Sections 311-313 of the Workmen's Compensation Act.

6. ☒ Other good cause. Please explain fully. Failure to obtain medical confirmation of the injury will not be considered good cause to deny benefits if caused by dilatory conduct of insurance carrier or employer.

The current information does not establish that your current condition was the result of your work acctivities on 2/28/96.

If it is alleged that physicians' reports were requested and not received, please give the date(s) that they were requested

_____. Attach a copy of request(s) for release(s).

INSURER/SELF-INSURER'S NAME AND BUREAU CODE

Consolidated Freightways / 721

SIGNATURE

Laura L. Gaskill

TELEPHONE NUMBER

(503)499-2104

EXHIBIT

30

37a

LIBC-496 REV 5-91

NOTICE OF WORKERS' COMPENSATION DENIAL

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501

This notice of employer/insurer intent to deny the claimant's right to workers' compensation benefits must be sent to the employee or dependant not later than 21 days of employer's notice or knowledge of employee's disability or death with a copy to be filed with the Department of Labor and Industry, Bureau of Workers' Compensation at the above address. Failure to comply may result in the imposition of penalties.

EMPLOYEE'S NAME
Steven Smith

STREET ADDRESS
843 Lindenwood Drive

CITY/TOWN | STATE | ZIP CODE
Pittsburgh | PA | 15234

EMPLOYEE'S SOCIAL SECURITY NUMBER
1 9 2 — 2 8 — 2 9 6 4

DATE OF INJURY (month - day - year)
0 2 — 2 8 — 9 6

EMPLOYER
Consolidated Freightways

STREET ADDRESS
73 Mc Candless Avenue

CITY/TOWN | STATE | ZIP CODE
Pittsburgh, | PA | 15201

EMPLOYER/INSURER CLAIM NUMBER

DATE OF THIS NOTICE (month - day - year)
0 5 — 0 6 — 9 6

The employer/insurer declines to pay workers' compensation benefits to claimant because:

1. ☐ The employee did not suffer a work-related injury. The definition of injury also includes aggravation of pre-existing condition, or disease contracted as a result of employment.
2. ☐ The injury was not within the scope of employment.
3. ☐ The employee was not employed by the defendant.

2. If occupational disease, the last date of employment and/or last date of exposure 2/28/96

3. How did the injury or disease happen? Company loaded three boxes of Trichloroethane, of which one box was damaged. I came in contact with the chemicals unknowingly thus causing the present health situation.

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4. When did it happen? (Give date of injury or onset of disease) 2/28/96 (month - day - year)

5. Where did it happen? Unloading company trailer Was it on employer's premises? ☐ Yes ☒ No

6. Notice of my injury or disease was served on my employer on 2/29/96 (date) in the following manner: Filled out accident report

7. What was your job title at time of injury or disease? Driver

8. Were you working for more than one employer at the time of your injury? ☐ Yes ☒ No

If Yes, name of additional employer(s): —

35 b

9. When, if ever, did this problem cause you to stop working? (give date) 4/12/96

LIBC-362 REV 5-91

CLAIM PETITION FOR WORKERS' COMPENSATION

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501

EMPLOYEE
Steven Smith

STREET ADDRESS
843 Lindenwood Drive

COUNTY/CITY/TOWN
Pittsburgh

STATE ZIP CODE
PA. 15234

TELEPHONE NUMBER
412 343-7454

SOCIAL SECURITY NUMBER
192-28-2964

DATE OF INJURY (month - day - year)
02-28-96

88

VS.

DEFENDANT EMPLOYER
Consolidated Freightways

STREET ADDRESS
73 McCandless Avenue

CITY/TOWN
Pittsburgh

STATE ZIP CODE
PA 15201

WORKERS' COMPENSATION INSURANCE CARRIER
(or adjusting company if self-insured)
Self-insured

STREET ADDRESS

CITY/TOWN STATE ZIP CODE

1. Complete description of injury or illness; including all parts of body affected. Exposed to unknown leaking poison which caused shortness of breath, irritated throat, sour taste in mouth, toxic brochitis, and lingering cough.

15. Is there other pending litigation in this case? ☐ Yes ☒ No

If Yes, explain: _____

A copy of this petition has been sent to the employer.

EMPLOYEE'S SIGNATURE

ATTORNEY NAME

ATTORNEY SIGNATURE

STREET ADDRESS

CITY/TOWN STATE ZIP CODE

TELEPHONE NUMBER

( ) _____

8

366

NOTICE: This Petition must be filled out as fully as possible. The original and five copies, either typed or printed, must be sent to the Bureau of Workers' Compensation, 1171 South Cameron Street, Room 103, Harrisburg, PA 17104-2501. A sixth copy must be sent by you to the employer. Information on the completion of this form may be obtained by calling the Bureau of Workers' Compensation at 800-482-2383

10. Are you back to work wi' 'he same employer? ☐ Yes ☒

If Yes, ☐ Regular Job ☐ Other Job (title) _____

11. Are you working with another employer? ☐ Yes ☒ No

If Yes, give name and address of employer: _____

_____

12. What were your wages at the time of the injury? (by hour, day or week) ~~$ 17.72 per hour~~

13. If you have returned to work since your injury or illness, are you earning ☐ more ☐ same ☐ less than you were at the time of Injury? Current earnings? Have not returned to work per _____.

14. I am seeking (check one or more and explain below):

☒ Payment for loss of wages.

☐ Partial disability from _____ (date) to _____ (date).

☒ Full disability from ~~4/12/96~~ (date) to ~~????~~ (date).

☒ Payment of medical bills (give name of doctor/hospital, address, type of treatment and bill below).

☒ Counsel fees to be paid by employer.

☐ Loss or loss of use of arm, hand, finger, leg, foot or toe.

☐ Disfigurement (scars) of head, face or neck.

☐ Additional compensation from the Second Injury Fund (due to existence of prior handicap).

☐ Loss of sight or hearing.

Explain: All bills ... as a result of this injury until I am made whole.

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1. Denied. It is specifically denied that the Claimant was exposed to an unknown leaking poison which caused shortness of breath, irritated throat, sour taste in mouth, toxic bronchitis and lingering cough and strict proof of these allegations is demanded.

2. Denied. It is specifically denied that the Claimant's work activities on 2/28/96 caused any work-related injury or occupational disease and strict proof of these allegations is demanded.

3. Denied. It is specifically denied that the company loaded three boxes of Trichloroethane, of which one box was damaged, and that the Claimant came into contact with chemicals unknowingly, which caused his current health problems, if any, and strict proof of these allegations is demanded.

4. Denied. It is specifically denied that the Claimant's work activites on 2/28/96 caused any work-related injury or occupational disease and strict proof of these allegations is demanded.

5. Denied. It is specifically denied that the Claimant sustained a work-related injury or developed an occupational disease as a result of unloading a company trailer on 2/28/96 and strict proof of these allegations is demanded.

CONTINUED ON ATTACHED SHEET

EXHIBIT

3A

3A 9

4 4 6

UBC-374 REV-11-93

RECEIVED
JUL 08 1996

DEFENDANT'S ANSWER TO EMPLOYEE CLAIM PETITION UNDER PENNSYLVANIA WORKERS' COMPENSATION ACT

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501

EMPLOYEE
Steven Smith

SOCIAL SECURITY NUMBER
192-28-2964

CLAIMANT IF OTHER THAN EMPLOYEE

STREET ADDRESS
843 Lindenwood Drive

CITY/TOWN
Pittsburgh

STATE
PA

ZIP CODE
15234

DATE
July 3 19 96

VS.

DEFENDANT EMPLOYER
Consolidated Freightways

STREET ADDRESS
73 McCandless Avenue

CITY/TOWN
Pittsburgh

STATE
PA

ZIP CODE
15201

INSURANCE CARRIER AND/OR ADJUSTING COMPANY
Consolidated Freightways

STREET ADDRESS
P.O. Box 4670

CITY/TOWN
Portland

STATE
OR

ZIP CODE
97208

92

TO YOUR HONORABLE JUDGE:

Answers must be identified by numerical order in direct response to corresponding numbered allegations on claim petition.

In answer to the aforesaid claim the Defendant [illegible]

Lori Adamcik Kariss, Esquire

Lori Adamcik Kariss

ADDRESS

1323 North Front Street

Harrisburg, PA 17102

TELEPHONE NUMBER

(717) 236-7300

NOTICE: This answer should be filed in a typed or printed original and three copies directly with the office of the Judge to whom the matter is assigned. Answers must be filed within 15 days. Every fact alleged in the claim petition not specifically denied by this answer shall be deemed to be admitted.

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As a matter of further defense, the Defendant states the following:

1. Claimant has failed to state a claim upon which relief can be granted.
2. Claimant did not sustain an injury during the course and scope of his employment.
3. Claimant did not develop an occupational disease as a result of work-related activitie
4. Claimant's alleged illness or disease is not a work-related condition.
5. Claimant's alleged illness or disease is due to a pre-existing, non-work related condition.
6. Defendant reserves the right to amend its New Matter upon receipt of additional information.

WHEREFORE, the Defendant requests that the claim petition be dismissed or in the alternative disallowed.

NAME (typed)

Lori Adamcik Kariss, Esquire

SIGNATURE

Lori Adamcik Kariss

Please enter my appearance for the Defendant:

ATTORNEY NAME

ATTORNEY SIGNATURE

set forth below. A copy of the Referee's decision is attached.

Findings of Fact Nos. 14 and 16

The Workers' Compensation Judge found that the claimant was exposed to a toxic substance. However, she made no finding with regard to the medical treatment undertaken by the claimant.

I hereby appeal from the decision of ~~Referee~~ Judge Kathleen Vallely and specify the following errors of law committed by the said Referee, and the reasons why the decision does not conform to the provisions of the Workmen's Compensation Act or the Occupational Disease Act. A copy of the Referee's decision is attached.

Conclusions of Law No. 2

The Workers' Compensation Judge found that the claimant suffered no "disability" as a result of his exposure to a toxic substance. However, she did not address the issue of medical treatment related to this exposure.

Please enter my appearance for appellant:

Gary D. Ludin, Esquire
Name

1302 Grant Building
Address

Pittsburgh, PA 15219
City, State & Zip Code

Steven Smith, Claimant
Name of party taking appeal
(Claimant or Defendant)

COPY OF REFEREE'S DECISION IS ATTACHED!

PROOF OF SERVICE MUST BE FILLED OUT ON THE SECOND PAGE!!

APPEAL SHOULD BE FILED IN AN ORIGINAL AND FOUR (4) COPIES!!!

A97-4601

UCB-25/26 REV 3-90

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKMEN'S COMPENSATION APPEAL BOARD
1171 S. CAMERON STREET, ROOM 305
HARRISBURG, PA 17104-2511

APPEAL FROM REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Steven Smith
Claimant

843 Lindenwood Drive
Address

Pittsburgh, PA 15234
City, State & Zip Code

vs.

Consolidated Freightways
Defendant

73 McCandless Avenue
Address

Pittsburgh PA 15201
City, State & Zip Code

Date: October 29, 1997

Petition Type: Claim

Circulation Date: 10/16/97

Social Security Number: 192-28-2964

Date of Injury: 2/28/96

Consolidated Freightways Corporation
Insurance Carrier of Delaware

P.O. Box 4670
Address

Portland, OR 97208
City, State & Zip Code

96

TO THE WORKMEN'S COMPENSATION APPEAL BOARD, HARRISBURG, PENNSYLVANIA:

I hereby appeal from the decision of ~~Referee~~ Judge Kathleen Vallely and allege the following findings of fact are in error and are not supported by substantial evidence, or contain other errors as specifically

TELEPHONE NUMBER

VS.

Consolidated Freightwaus
DEFENDANT-EMPLOYER

73 McCandless
STREET ADDRESS

Pittsburgh PA 15201
COUNTY/CITY/TOWN STATE ZIP CODE

Consolidated Freightwaus Corporation
INSURANCE CARRIER of Delawane
(or adjusting company if self-insured)

P.O. Box 4670
STREET ADDRESS

Portland OR 97208
COUNTY/CITY/TOWN STATE ZIP CODE

TO YOUR HONORABLE JUDGE:

Employer/Employee Steven Smith as of 4/12/96
(MONTH-DAY-YEAR)

requests the Workers' Compensation Judge order the above action for the following reason(s):

The Workers' Compensation Judge found that the claimant was exposed to a toxic substance. However, while she found that no "disability" resulted, she made no finding with regard to the medical bills incurred as a result of the exposure. Therefore, claimant seeks a review of the Workers' Compensation Judge's decision on the issue of medical treatment.

(OVER)

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LIBC-378 REV 8-96

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501

PETITION TO

CL# (BUREAU USE ONLY)

- [X] Review Medical Treatment and/or Billing
- [ ] Terminate Compensation Benefits (Stop Payment of Workers' Compensation)
- [ ] Terminate Compensation: Based Upon Physician's Affidavit, a Special Supersedeas Hearing to be Scheduled
- [ ] Modify Compensation Benefits (Reduce/Increase Amount of Workers' Compensation)
- [ ] Suspend Compensation Benefits
- [ ] Review Compensation Benefits (Ask Judge to Review Agreement/Notice For Mistake)
- [ ] Reinstate Compensation Benefits
- [ ] Set Aside Final Receipt (Ask Judge to Set Aside Agreement to Stop Compensation)
- [ ] Seek Approval of a Compromise and Release Agreement (Ask Judge to Approve Settlement)

98

This petition is filed on behalf of: [X] Employee or [ ] Employer/Insurer

Steven Smith
EMPLOYEE

843 Lindenwood Drive
STREET ADDRESS
(Use same address as shown on last workers' compensation check)

Pittsburgh — PA — 15234
COUNTY/CITY/TOWN — STATE — ZIP CODE

(412) 343-7454

SOCIAL SECURITY NUMBER

1 9 2 – 2 8 – 2 9 6 4

DATE OF INJURY (Month-Day-Year)

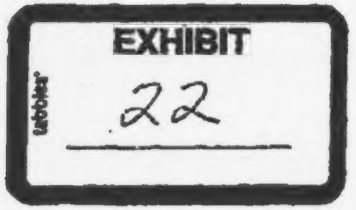
0 2 – 2 8 – 9 6

Pittsburgh, PA 15219

COUNSEL FOR EMPLOYER: KEVIN C. COTTONE, ESQUIRE
Marshall & Farrell, P.C.
1323 North Front Street
Harrisburg, PA 17102

99

REPORTER: JULIETTE HOFFMAN



11 C

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
PITTSBURGH

* * * * * * * * * *

STEVEN SMITH, *
Claimant * S.S. # 192-28-2964
*
VS. * WCOD
*
CONSOLIDATED FREIGHTWAYS, *
Employer *

* * * * * * * * * *

Before: Kathleen Vallely
Workers' Compensation Judge

Hearing: July 25, 1996

Fourth Floor
933 Penn Avenue
Pittsburgh, PA 15222-3813

* * * * * * * * * *

COUNSEL FOR CLAIMANT: GARY LUDIN, ESQUIRE
1302 Grant Building

100

minutes to a half hour later, I went to my first stop at C & C Lumber in Tarrs.

At that point, I backed into the stock at C & C Lumber in Tarrs. And you back into a door depending on what project the place is in the yard. If you have lumber, you go to one place. And you have building materials, then you go to another place. And if you have building supplies you come in the gate, the first gate. You make a left hand turn. You back into these old big garage doors. There is no dock there. You just back up. There's no dock there. Unless you take

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12a

equipment out. I checked my first stop. And it was a bathtub loaded on top of three crates. It was like a jacuzzi tub. It was banded to a pallet. It was loaded on top of three crates.

And then I looked to see where the other stop was. The next stop was West Penn Power, which the jacuzzi bathtub was stacked on. There was boxes for West Penn Power to the right of the three crates. And after I checked it out. I got my bills. And I had a hazardous material. And I put that bill on the top of the shipment freight, and I went and looked up.

And I left the terminal. About maybe 20

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high. And when I got to C & C Lumber in Falls, the guy has an electric jack that they go to the warehouse on. You see them, they have like legs. The things goes up. Have you been in a warehouse, where they have those tow motors that go way up? So when I got to C & C Lumber, I went inside the trailer because I had to push the tub back here (indicating). So I had to go back and push the tub forward because the man's pallet didn't come up to the pallet.

103

COURT REPORTER:

Can you go a little slower?

·PITTSBURGH,PA ·CLEARFIELD, PA ·BELLEFONTE, PA ·ERIE, PA ·OIL CITY, PA ·HARRISBURG, PA
SARA ANN SARGENT
COURT REPORTING SERVICE
210 Main Street
Johnstown, PA 15901
(814) 536-8908
·INDIANA, PA ·GREENSBURG, PA ·PHILADELPHIA, PA ·SOMERSET, PA ·WILKES-BARRE, PA ·CHARLESTON, WV

the finish window, that is in the back. Everything has to be round up. That particular day, the bath tub was loaded on top of the three crates, like the crates were about this high (indicating), and the bath was about this high (indicating).

Q. Okay. That doesn't show on the transcript. You're pointing over your head. So what are you, about five feet nine inches?

A. Yeah.

Q. So it would be over six feet tall?

A. Yeah. The crates are about --- they were sitting on the other pallets. It was up there

104

like a slight grader there. And what we had to do was to bring the tub back to catch it and then pull this thing out of the thing. And I was there pushing and trying to get off the top of the wood. It's like a hundred and some pounds. There is no position to get any, you know, mechanical lift. I was just like fighting the thing.

And we finally got it to the back of the truck. And he took it off and I left there. And I wasn't feeling --- I didn't know why --- I don't know what it was. I was lightheaded. I strained myself. I left there, and I got the

105

14a

A. I'm sorry. Where do you want to start with?

COURT REPORTER:

To push the tub forward.

A. I had to go back and push the tub forward. It was sitting on the crates because it was like sticking it in there. And there was a smell in the truck like an acrylic smell which I thought was the bathtub. Because when you have like new products or something, it has that odor to it, the newness odor.

And the man that came with the tow motor and the blades wouldn't fit the pallet, because you could only go up so high. There was

So I always check to see if the things are compatible, and I always check to see if I have to have the trailer placard, because lots of times in the morning --- under CDL under hazardous materials, you're responsible. Once --- no matter what mistake is made my management or another union employee, you're responsible for that trailer once you leave the yard with it.

107

JUDGE VALLELY:

Okay. What's CDL?

A. That's the Commercial Driver's License.

JUDGE VALLELY:

152

bill signed. And I went down to West Penn Power. And that was where the three crates were for and the tree cartons to the right of the crates.

Q. Let me interrupt you. You mentioned something about a bill that had hazardous material on it?

A. When you leave in the morning, you always check your paperwork, because I've already come in the morning where they've had poison loaded with food stuff. And you have to correct it. Because once you leave the street, when you leave the terminal, anything on that truck that's improper is the driver's responsible. That's the CDL law.

108

A placard. A sign. That's all I wanted to know.

A. So that morning I saw the X there and then you look at the quantity. And the quantity was about --- I don't know what the exact quantity of the bill was. That's another thing that you're responsible for because they always check all the bills routes of the placards If you do get caught, if I was --- like if you're loading my truck with a poisonous material and food stuff, and I go out on the street, and I don't catch that mistake, the points come against me as a driver.

109

16a

Commercial Driver's License.

A. Commercial Driver's License.

JUDGE VALLELY:

And you said placard, what do you mean when you have to have a placard?

A. It's like saying you have ---.

JUDGE VALLELY:

A sealant.

A. --- if you have flammables or corrosives or dangerous --- say you have a thousand pounds of flammable and 500 pounds of corrosive, you'd put a dangerous placard, you'd put a flammable placard.

JUDGE VALLELY:

--- that's all

110

Finally, I will direct your attention to Patel v. WCAB (Saquoit Fibers Company), 520 A.2d 525 (Pa. Cmwlth. 1987). The Patel case provides for assessment of costs and attorneys' fees under identical facts. I am writing this as a professional courtesy in order to avoid having to resort to the above-referenced remedies. Thank you for your attention in this matter.

Very truly yours,

Michael A. Farrell

Michael A. Farrell

MAF/sas
cc: Ken Hector, CNF Adtech Center
John Mogck, Sedgwick

Sincerely,

Sam Stancato

Sam Stancato
Consolidated Freightways

21

73 MCCANDLESS AVENUE, PITTSBURGH, PA 15201 (412) 782-0471 (412) 782-3346 FAX

CONSOLIDATED FREIGHTWAYS

Date: March 8, 2001

Occupational Safety and Health Administration
Federal Building-- Room 1428
1000 Liberty Avenue
Pittsburgh, PA 15222

Certified Mail -- 7000 0600 0022 8483 1014

Re: Request for records, Steven Smith.

Mr. Szymanski,

Enclosed you will find the records you have requested in your letter of February 20th for the above mentioned former employee.

21. NAME AND ADDRESS OF FACILITY WHERE SERVICES RENDERED (IF OTHER THAN HOME OR OFFICE)

22. WAS LABORATORY WORK PERFORMED OUTSIDE YOUR OFFICE? YES [ ] NO [ ] CHARGES:

23. A. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY. RELATE DIAGNOSIS TO PROCEDURE IN COLUMN D BY REFERENCE 1, 2, 3, ETC. OR DX CODE

1. 994.9-EXPOSURE
2.
3.
4.

B. JUN 25 1996

EPSDT [ ] YES [ ] NO

FAMILY PLANNING [ ] YES [ ] NO

PRIOR AUTHORIZATION NO.

24. A. DATE OF SERVICE FROM	TO	B. PLACE OF SERVICE	C. FULLY DESCRIBE PROCEDURES, MEDICAL SERVICES OR SUPPLIES FURNISHED FOR EACH DATE GIVEN. PROCEDURE CODE (IDENTIFY)	(EXPLAIN UNUSUAL SERVICES OR CIRCUMSTANCES)	D. DIAGNOSIS CODE	E. CHARGES	F. DAYS OR UNITS	G. T.O.S.	H. LEAVE BLANK
04/15/96		3	99284-25	EMER DEPT - EST PATIENT	1	161.00	1		
04/15/96		3	99203	INTERMEDIATE VISIT.	N 1	80.00	1		

25. SIGNATURE OF PHYSICIAN OR SUPPLIER (INCLUDING DEGREE(S) OR CREDENTIAL(S)) I CERTIFY THAT THE STATEMENTS ON THE REVERSE APPLY TO THIS BILL AND ARE MADE A PART THEREOF)

JAMES J. FORTUNATO M.D.

DATE: 06/18/96

26. ACCEPT ASSIGNMENT (GOVERNMENT CLAIMS ONLY) (SEE BACK) YES [ ] NO [X]

27. TOTAL CHARGE 241.00

28. AMOUNT PAID 0.00

29. BALANCE DUE 241.00

30. YOUR SOCIAL SECURITY NO.

31. PHYSICIAN'S SUPPLIER'S AND/OR GROUP NAME, ADDRESS, ZIP CODE AND TELEPHONE NO.

H.A.P.P.I.
4221 PENN AVENUE, SUITE 502
PITTSBURGH, PA 15224
(412) 622-4448

32. YOUR PATIENT'S ACCOUNT NO.

149600*1*3

33. YOUR EMPLOYER I.D. NO.

251471756

I.D. NO.

* PLACE OF SERVICE AND TYPE OF SERVICE (T.O.S.) CODES ON THE BACK

REMARKS: P= Not 45 Days.

APPROVED BY AMA COUNCIL ON MEDICAL SERVICE 6/83

Form HCFA-1500 (1-84) (C-2) Form OWCP-1500
Form CHAMPUS-501

23

[redacted]

[ ] MEDICARE (MEDICARE NO.)	[ ] MEDICAID (MEDICAID NO.)	[ ] CHAMPUS (SPONSOR'S SSN)	[ ] CHAMPVA (VA FILE NO.)	[ ] FECA BLACK LUNG (SSN)	[X] OTHER (CERTIFICATE SSN)

FORM APPROVED OMB NO. 0938-0008

PATIENT AND INSURED (SUBSCRIBER) INFORMATION

1. PATIENT'S NAME (LAST NAME, FIRST NAME, MIDDLE INITIAL) SMITH, STEVEN	2. PATIENT'S DATE OF BIRTH 01 28 37	3. INSURED'S NAME (LAST NAME, FIRST NAME, MIDDLE INITIAL) CF MOTOR FREIGHT
4. PATIENT'S ADDRESS (STREET, CITY, STATE, ZIP CODE) 843 LINDENWOOD DR PITTSBURGH, PA 15234 TELEPHONE NO. (412) 343-7454	5. PATIENT'S SEX MALE [X] FEMALE [ ]	9. INSURED'S I.D. NO. (FOR PROGRAM CHECKED ABOVE, INCLUDE ALL LETTERS) 192282964
	7. PATIENT'S RELATIONSHIP TO INSURED SELF [X] SPOUSE [ ] CHILD [ ] OTHER [ ]	8. INSURED'S GROUP NO. (OR GROUP NAME OR FECA CLAIM NO.) [ ] INSURED IS EMPLOYED AND COVERED BY EMPLOYER HEALTH PLAN
9. OTHER HEALTH INSURANCE COVERAGE (ENTER NAME OF POLICYHOLDER AND PLAN NAME AND ADDRESS AND POLICY OR MEDICAL ASSISTANCE NUMBER)	10. WAS CONDITION RELATED TO: A. PATIENT'S EMPLOYMENT YES [X] NO [ ] B. ACCIDENT AUTO [ ] OTHER [ ]	11. INSURED'S ADDRESS (STREET, CITY, STATE, ZIP CODE) 73 MC CANDLESS AVENUE PITTSBURGH, PA 15201 TELEPHONE NO. (412) 782-0471 11a. CHAMPUS SPONSOR'S: STATUS [ ] ACTIVE DUTY [ ] DECEASED [ ] RETIRED BRANCH OF SERVICE
12. PATIENT'S OR AUTHORIZED PERSON'S SIGNATURE (READ BACK BEFORE SIGNING) I AUTHORIZE THE RELEASE OF ANY MEDICAL INFORMATION NECESSARY TO PROCESS THIS CLAIM. I ALSO REQUEST PAYMENT OF GOVERNMENT BENEFITS EITHER TO MYSELF OR TO THE PARTY WHO ACCEPTS ASSIGNMENT BELOW. SIGNED SIGNATURE ON FILE DATE 06/18/96		13. I AUTHORIZE PAYMENT OF MEDICAL BENEFITS TO UNDERSIGNED PHYSICIAN OR SUPPLIER FOR SERVICE DESCRIBED BELOW. SIGNATURE ON FILE SIGNED (INSURED OR AUTHORIZED PERSON)

PHYSICIAN OR SUPPLIER INFORMATION

14. DATE OF:	ILLNESS (FIRST SYMPTOM) OR INJURY (ACCIDENT) OR PREGNANCY (LMP)	15. DATE FIRST CONSULTED YOU FOR THIS CONDITION	16. IF PATIENT HAS HAD SAME OR SIMILAR ILLNESS OR INJURY, GIVE DATES	16a. IF EMERGENCY CHECK HERE [ ]
17. DATE PATIENT ABLE TO RETURN TO WORK	18. DATES OF TOTAL DISABILITY FROM THROUGH		DATES OF PARTIAL DISABILITY FROM THROUGH	
17a. NAME OF REFERRING PHYSICIAN OR OTHER SOURCE	17b. I.D. NO.		19. RESERVED FOR LOCAL USE	20. FOR SERVICES RELATED TO HOSPITALIZATION GIVE HOSPITAL DATES

19. RESERVED FOR LOCAL USE

20. OUTSIDE LAB? ☐ YES ☐ NO — $ CHARGES

21. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY. (RELATE ITEMS 1,2,3 OR 4 TO ITEM 24E BY LINE)
1. 987.9
2. 786.09
3.
4.

22. MEDICAID RESUBMISSION CODE — ORIGINAL REF. NO.

23. PRIOR AUTHORIZATION NUMBER

24 A DATE(S) OF SERVICE From MM DD YY	To MM DD YY	B Place of Service	C Type of Service	D PROCEDURES, SERVICES, OR SUPPLIES (Explain Unusual Circumstances) CPT/HCPCS	MODIFIER	E DIAGNOSIS CODE	F $ CHARGES	G DAYS OR UNITS	H EPSDT Family Plan	I EMG	J COB	K RESERVED FOR LOCAL USE
05 06 96		11		99214		1-2	45 00	1				

25. FEDERAL TAX I.D. NUMBER: 25-1514952 — SSN ☐ EIN ☒

26. PATIENT'S ACCOUNT NO.

27. ACCEPT ASSIGNMENT? (For govt. claims, see back) ☐ YES ☐ NO

28. TOTAL CHARGE $ 45 00

29. AMOUNT PAID $ 000

30. BALANCE DUE $ 45 00

31. SIGNATURE OF PHYSICIAN OR SUPPLIER INCLUDING DEGREES OR CREDENTIALS
(I certify that the statements on the reverse apply to this bill and are made a part thereof.)
SIGNED Norman J. Frey III, D.O. DATE 5/8/96

32. NAME AND ADDRESS OF FACILITY WHERE SERVICES WERE RENDERED (If other than home or office)

33. PHYSICIAN'S, SUPPLIER'S BILLING NAME, ADDRESS, ZIP CODE & PHONE #
Norman J. Frey, III, D.O.
3 Boggs Avenue
Pittsburgh, PA 15211
PIN# 4123814200

25

790-0128 (12/90) (OCR) 1 pt.

(APPROVED BY AMA COUNCIL ON MEDICAL SERVICE 6 88)

PLEASE PRINT OR TYPE

FORM HCFA-1500 (12-90)
FORM OWCP-1500 FORM RRB-1500

PLEASE DO NOT STAPLE IN THIS AREA

[redacted]

PICA

HEALTH INSURANCE CLAIM FORM

PICA

1. MEDICARE (Medicare #)	MEDICAID (Medicaid #)	CHAMPUS (Sponsor's SSN)	CHAMPVA (VA File #)	GROUP HEALTH PLAN (SSN or ID)	FECA BLK LUNG (SSN)	OTHER (ID)	1a. INSURED'S I.D. NUMBER (FOR PROGRAM IN ITEM 1)
					X		192-28-2964

2. PATIENT'S NAME (Last Name, First Name, Middle Initial) SMITH, STEVEN	3. PATIENT'S BIRTH DATE MM DD YY 04 28 37 SEX M X F	4. INSURED'S NAME (Last Name, First Name, Middle Initial)
5. PATIENT'S ADDRESS (No., Street) 843 LINDENWOOD DRIVE	6. PATIENT RELATIONSHIP TO INSURED Self Spouse Child Other	7. INSURED'S ADDRESS (No., Street)
CITY: PITTSBURGH — STATE: PA	8. PATIENT STATUS Single Married Other Employed Full-Time Student Part-Time Student	CITY — STATE
ZIP CODE: 15234 — TELEPHONE (Include Area Code): (412) 3437454		ZIP CODE — TELEPHONE (INCLUDE AREA CODE) ( )
9. OTHER INSURED'S NAME (Last Name, First Name, Middle Initial) same	10. IS PATIENT'S CONDITION RELATED TO:	11. INSURED'S POLICY GROUP OR FECA NUMBER
a. OTHER INSURED'S POLICY OR GROUP NUMBER	a. EMPLOYMENT? (CURRENT OR PREVIOUS) X YES NO	a. INSURED'S DATE OF BIRTH MM DD YY SEX M F
b. OTHER INSURED'S DATE OF BIRTH MM DD YY SEX M F	b. AUTO ACCIDENT? PLACE (State) YES X NO	b. EMPLOYER'S NAME OR SCHOOL NAME
c. EMPLOYER'S NAME OR SCHOOL NAME	c. OTHER ACCIDENT? YES X NO	c. INSURANCE PLAN NAME OR PROGRAM NAME
d. INSURANCE PLAN NAME OR PROGRAM NAME	10d. RESERVED FOR LOCAL USE	d. IS THERE ANOTHER HEALTH BENEFIT PLAN? YES NO If yes, return to and complete item 9 a-d.

READ BACK OF FORM BEFORE COMPLETING & SIGNING THIS FORM.

12. PATIENT'S OR AUTHORIZED PERSON'S SIGNATURE I authorize the release of any medical or other information necessary to process this claim. I also request payment of government benefits either to myself or to the party who accepts assignment below.

SIGNED X [signature] DATE 5-6-96

13. INSURED'S OR AUTHORIZED PERSON'S SIGNATURE I authorize payment of medical benefits to the undersigned physician or supplier for services described below.

SIGNED X [signature]

14. DATE OF CURRENT: MM DD YY 02 28 96 — ILLNESS (First symptom) OR INJURY (Accident) OR PREGNANCY(LMP)	15. IF PATIENT HAS HAD SAME OR SIMILAR ILLNESS. GIVE FIRST DATE MM DD YY	16. DATES PATIENT UNABLE TO WORK IN CURRENT OCCUPATION MM DD YY FROM — TO MM DD YY
17. I.D. NUMBER OF REFERRING PHYSICIAN		18. HOSPITALIZATION DATES RELATED TO CURRENT SERVICES MM DD YY

OCCUPATION: [illegible] PHONE: [illegible]

If Pre-Placement, what company?

Postion Applied For:

INJURY

What did you injure? Date of injury: 2-28-

How did the injury occur? Exposed to person - unknown at time of Accident

Workers' Compensation Carrier [illegible]

Signature: [signature] Date: 4-15-96

EXHIBIT 6

MEDICAL INSURANCE

INSURANCE COMPANY NAME: SUBSCRIBER'S NAM

GROUP NUMBER: AGREEMENT NUMBER:

369

HAPPI PERSONAL DATA

TODAY'S DATE: 4-15-96

NAME: Smith Steven (Last) (First) (M) PHONE (home): 412 343-7454

PHONE (work): 782-0471

ADDRESS: 843 Lindenwood Drive

CITY: Pittsburgh STATE: PA ZIP: 15234

SOCIAL SECURITY NUMBER: 192 28 2964

BIRTHDATE: 4-28-37 SEX: Male MARITAL STATUS: (M) S D Sep

58

EMPLOYER: C F Motor Freight Inc

ADDRESS: 73 McCandless CITY: Ppgh STATE: PA

ZIP: 15201

( ) No lifting over _____ lbs.
( ) No use of _____
( ) No prolonged standing for _____ hours
( ) No bending or stooping
( ) No use of motorized tools

3. ( ) Unfit for full/modified duty No heavy physical exertion

The following procedures were performed by me/my representative:

( ) Employer notified by phone

( ) Instructions given to call HAPPI office, 622-4448

Attending Physician Signature C J Davis

EXHIBIT 7

4221 PENN AVENUE PITTSBURGH, PENNSYLVANIA 15224 412/622-4448

ST. FRANCIS HEALTH SYSTEM

Health Assistance Program for Personnel in Industry (H.A.P.P.I.)

Health Assistance Program for Personnel in Industry
(Happi)

St. Francis Medical Center
Emergency Department
(412) 622-4266

Work Status Report

Name _____

Company _____

Date _____

I examined the above named patient in the Emergency Department and I found him/her to be:

1. ( ) Fit for Full Duty

2. ( ) Unfit for Full Duty, but fit for modified duty with the following restrictions.

X-Ray/Laboratory : E.R. 4/12: CHEST X-RAY, EKG & PULSE OXIMETRY

Treatment : CONTINUE MEDS AS PER E.R.
OBSERVATION - REPORT TO E.R. IF ANY INCREASED PROBLEMS
PT TO F/U WITH OWN M.D., DR FREY -- OK'D PER CO.

Prognosis : EXAM: SKIN: WARM & DRY. GOOD COLOR. HEENT EXAM UNREMARKABLE.
CHEST: FULL & EQUAL EXPANSION. LUNGS CLEAR. NO SHORTNESS OF
BREATH NOW. NEURO INTACT. NECK, BACK & ABDOMEN: NORMAL.

Referral :
DR FREY/OWN M.D.

Beginning Disability : 4/15/96 Ending Disability : INDEFINITE

Expected RTW Date : OFF WORK

31

Full Duty
Modified Duty; List Restrictions:
**DR FORTUNATO DISCUSSED CASE
WITH SAM STANCATO AT CO. --
OK FOR PT TO SEE OWN M.D.

Next Appointment Date :

Physician's Signature : _____
JAMES J. FORTUNATO M.D.

V1H.A.P.P.I.V0
4221 PENN AVENUE, SUITE 502

PITTSBURGH, PA 15224

04/16/96

INITIAL EVALUATION

PATIENT

SMITH, STEVEN
843 LINDENWOOD DR
PITTSBURGH, PA 15234
(412) 343-7454
S.S.N.# : 192-28-2964
D.O.B. : 04/28/37
D.O.I. : 02/28/96
Occupat.: DRIVER

EMPLOYER

CF MOTOR FREIGHT
73 MC CANDLESS AVENUE
PITTSBURGH, PA 15201
(412) 782-0471
Attn: FAYE BISHOP

Date of First Treatment: 04/12/96

History : PT STATES THAT HE WAS EXPOSED TO TRICHLOROETHYLENE FUMES AT WORK ON 2/28/96 & DID NOT REALIZE IT. HE WORKED UNTIL 3/14, THEN WENT ON VACATION 3/15 - 3/31, AND RETURNED TO WORK 4/1.

Physical Examination : HE NOTED SHORTNESS OF BREATH WITH EXERTION AFTER THE INCIDENT, AND AGAIN AFTER HE RETURNED FROM HIS VACATION. HE DID NOT MISS ANY WORK. BECAME CONCERNED. SAW SFMC E.R. 4/12/96.

Diagnosis :

HISTORY OF CHEMICAL EXPOSURE TO TRICHLOROETHYLENE

32

d) SPECIAL PROTECTIVE MEASURES

33

J Whitcomb MD. M.D.

EXHIBIT 8

34a

EAPPLIEd (Assistance Program for Personnel Industry)

EUGENE E. GINCHEREAU, M.D. - MD017832
RICHARD LIEDKE, M.D. - 0135472
JAMES J. FORTUNATO, M.D. - MD025892L
MARK WILSON, M.D. - 0005652

St. Francis Medical Center, John R. Arnold Medical Offices, 401 Penn Avenue, Suite 302, Pittsburgh, PA 15221, 412/622-4444
St. Francis Medical Office Building-North, Three St. Francis Way, Suite 101, Mars, PA 16046, 724/772-3400
St. Francis Central Hospital, 1200 Center Avenue, Pittsburgh, PA 15212, 412/562-1000

NAME Steven Smith DATE April 15 96

PATIENT ☐ MAY RETURN TO WORK
☑ MAY NOT RETURN TO WORK

☐ EFFECTIVE DATE till released by Dr Frey

☐ RESTRICTED ACTIVITIES _____

_____

34

Company sent me to other doctor than mine — not responsible to pay this Bill

†O—Doctor's Office IH—Inpatient Hospital NH—Nursing Home
H—Patient's Home OH—Outpatient Hospital OL—Other Locations
*ICDA—International Classification of Diseases
**CPT—Current Procedural Terminology (current edition)

TOTAL CHARGES ▶ $
AMOUNT PAID ▶ $
BALANCE DUE ▶ $

EXHIBIT 5

4. DATE SYMPTOMS FIRST APPEARED OR ACCIDENT HAPPENED. 2/28/96

5. DATE PATIENT FIRST CONSULTED YOU FOR THIS CONDITION 4/12/96

6. PATIENT EVER HAD SAME OR SIMILAR CONDITION? YES ☐ NO ☐ Unknown IF "YES" WHEN AND DESCRIBE
PATIENT HOSPITALIZED: FROM TO

7. PATIENT STILL UNDER YOUR CARE FOR THIS CONDITION YES ☐ NO ☒
NAME AND ADDRESS OF HOSPITAL:

8. PATIENT WAS CONTINUOUSLY TOTALLY DISABLED (UNABLE TO WORK). FROM 4/15/96 THRU present

9. PATIENT WAS PARTIALLY DISABLED. FROM 4/12/96 THRU 4/15/96

35

10. IF STILL DISABLED, DATE PATIENT SHOULD BE ABLE TO RETURN TO WORK. To be determined by Dr. Frey

11. PATIENT WAS HOUSE CONFINED. FROM THRU

12. DOES PATIENT HAVE OTHER HEALTH COVERAGE? YES ☐ NO ☐ IF "YES" PLEASE IDENTIFY

13. I DO NOT ACCEPT ASSIGNMENT ☐ T.I.N. OR SOC. SEC. NO.

DATE	PHYSICIAN'S NAME (PRINT)	SIGNATURE	DEGREE	TELEPHONE
5/10/96	Dr. J.J. Fortunato	Dr. J.J. Fortunato	/md	622-4448

STREET ADDRESS	CITY OR TOWN	STATE OR PROVINCE	ZIP CODE
4221 Penn Ave., #502	Pittsburgh,	PA	15224

Approved by Council on Medical Service, AMA 12-94

35a

Premier 622 637-0 (5)

TO BE COMPLETED BY EMPLOYEE

Spaced for Typewriter — Marks for Tabulator Appear on this Line

PATIENT'S NAME AND ADDRESS: Steven Swift | TELEPHONE NO.: 343-7454

EMPLOYEE'S NAME IF PATIENT IS A DEPENDENT

NAME OF PREVIOUS EMPLOYER

ADDRESS | NO. AND STREET | CITY | STATE

AUTHORIZATION TO PAY BENEFITS TO PHYSICIAN: I hereby authorize payment directly to the undersigned Physician of the Surgical and/or Medical Benefits, if any, otherwise payable to me for his services as described below but not to exceed the reasonable and customary charge for those services.

SIGNED (EMPLOYEE) Steven Swift DATE 4-5-10-96

AUTHORIZATION TO RELEASE INFORMATION: I hereby authorize the undersigned Physician to release any information acquired in the course of my examination or treatment.

SIGNED (PATIENT, OR PARENT IF MINOR)

DATE

ATTENDING PHYSICIAN'S STATEMENT

1. DIAGNOSIS AND CONCURRENT CONDITIONS
(IF DIAGNOSIS CODE OTHER THAN ICDA* USED, GIVE NAME):
History of Chemical Exposure - Trichloroethylene

2. IS CONDITION DUE TO INJURY OR SICKNESS ARISING OUT OF PATIENT'S EMPLOYMENT? YES [X] NO [ ]
PREGNANCY? YES [ ] NO [ ]
IF YES, APPROXIMATE DATE PREGNANCY COMMENCED. DATE

3. REPORT OF SERVICES (OR ATTACH ITEMIZED BILL) (IF PREVIOUS FORM SUBMITTED TO THIS CARRIER, YOU NEED SHOW ONLY DATES AND SERVICES SINCE LAST REPORT)

DATE OF SERVICES	PLACE OF SERVICES†	DESCRIPTION OF SURGICAL OR MEDICAL SERVICES RENDERED	PROCEDURE CODE — IF USED (IF CODE OTHER THAN CPT* USED, GIVE NAME)	CHARGES
4/12/96	E.R.	~~Chest~~ xray, EKG, Pulse Oximetry		
4/15/96	O	Exam		

DIOXANE

CAS: 123-91-1 | 1987 TLV = 25 ppm; skin

$C_4H_8O_2$

Synonyms: 1,4–Diethylene dioxide; diethylene ether; 1,4–dioxacyclohexane; 1,4–dioxane; *p*-dioxane; dioxyethylene ether

Physical Form. Flammable liquid

Uses. Solvent; stabilizer in chlorinated solvents

Exposure. Inhalation; skin absorption

Toxicology. Dioxane is an irritant of the eyes and mucous membranes; on prolonged exposure, it is toxic to the liver and kidneys. It is carcinogenic in experimental animals.

Human volunteers exposed for 15 minutes to 300 ppm reported mild transient irritation of the eyes, nose, and throat.[1] Exposure to 1600 ppm for 10 minutes caused immediate burning of the eyes with lacrimation, and, at 5,500 ppm for 1 minute, slight vertigo was also noted.[2] Five deaths due to heavy exposure for 5 weeks have been re-

37

2. von Oettingen WF: The Aromatic Amino and Nitro Compounds, Their Toxicity and Potential Dangers, US Public Health Service Bulletin No 271, pp 108–111. Washington, DC, US Government Printing Office, 1941
3. Chemical Safety Data Sheet SD–93, Dinitrotoluenes, pp 5–6, 14–15. Washington, DC, MCA, Inc, 1966
4. Linch AL: Biological monitoring for industrial exposure to cyanogenic aromatic nitro and amino compounds. Am Ind Hyg Assoc J 35:426–432, 1974
5. Rieder RF: Methemoglobinemia and sulfhemoglobinemia. In Wyngaarden JB, Smith LH (eds): Cecil Textbook of Medicine, 16th ed, p 896. Philadelphia, WB Saunders Co, 1982
6. Mangelsdorff AF: Treatment of methemoglobinemia. AMA Arch Ind Health 14:148–153, 1956

38

bits.[6,8] No adverse effects were observed in rats exposed to 111 ppm 8 hours/day, 5 days/week for 2 years.[9]

The liquid applied to rabbit and guinea pig skin was rapidly absorbed and produced signs of incoordination and narcosis. Repeated applications caused liver and kidney damage.[6] Instilled in a rabbit's eye, dioxane produced hyperemia and purulent conjunctivitis.[10]

High doses of dioxane by oral administration produced malignant tumors of the nasal cavity and liver in rats, and tumors of the liver and gallbladder in guinea pigs.[5,11] The carcinogenic risk has not been established for humans.[11]

Appl Pharmacol 30:287–298, 1974

10. von Oettingen WF, Jirouch EA: The pharmacology of ethylene glycol and some of its derivatives in relation to their chemical constitution and physical chemical properties. Pharmacol Exp Ther 42:355–372, 1931

11. IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man, Cadmium, Nickel, Some Epoxides, Miscellaneous Industrial Chemicals and General Considerations on Volatile Anaesthetics, Vol 11, pp 203–253. Lyon, International Agency for Research on Cancer, 1976

ported.[3] Signs and symptoms of poisoning included epigastric pain, anorexia, and vomiting, followed by oliguria, anuria, coma, and death. At autopsy, there was liver necrosis, kidney damage, and edema of the lungs and brain. Another fatal case involved a 1-week exposure to levels ranging from 208 to 605 ppm and possibly higher with concurrent skin exposure.[4] Epigastric pain, increased blood pressure, convulsions, and unconsciousness preceded death. Studies of workers exposed at levels up to 24 ppm for periods of up to 50 years showed no increase in chronic disease, no excess total deaths, no excess cancer deaths, or common cause of death.[5]

Applied to human skin, dioxane causes dryness without other signs of irritation; hypersensitivity has been reported.[5]

In animal experiments, guinea pigs exposed to 30,000 ppm for 3 hours exhibited narcosis after 87 minutes and died within 2 days.[6] The LC_{50} for rats was 14,000 ppm for 4 hours.[7] Repeated exposure of several animal species to 1,000 ppm produced damage to kidneys and liver, and repeated inhalation of 800 ppm over 30 days resulted in fatal kid-

The warning properties are inade-
quate to prevent overexposure. Al-
though it has a low odor threshold (3-
6 ppm), dioxane is not unpleasant and
persons acclimatize within a few min-
utes.[5]

REFERENCES

1. Silverman L, Schulte HF, First MW: Furthe
studies on sensory response to certain indu
trial solvent vapors. J Ind Hyg Toxicol 28:262
266, 1946
2. Yant WP et al: Acute response of guinea pi
to vapors of some new commercial organi
compounds—VI. Dioxan. Pub Health Re
45:2023–2032, 1930
3. Barber H: Haemorrhagic nephritis and nec
sis of the liver from dioxane poisoning. Guy
Hosp Rep 84:267–280, 1934
4. Johnstone RT: Death due to dioxane? Arch In
Health 20:445–447, 1959
5. National Institute for Occupational Safety an
Health: Criteria for a Recommended Standar
. . . Occupational Exposure to Dioxan
DHEW (NIOSH) Pub No 77–226. Washingto
DC, US Government Printing Office, 1977
6. Fairley A et al: The toxicity to animals of
dioxane. J Hyg 34:486–501, 1934
7. Pozzani UC et al: The toxicologic basis
threshold limit values—5. Am Ind Hyg Asso
J 20:364–369, 1959
8. Smyth HF Jr: Improved communication—I
gienic standards for daily inhalation. Am I
Hyg Assoc J 17:129–185, 1956
9. Torkelson TR et al: 1,4–Dioxane—II. Resul

2. If occupational disease, give the last date of employment MONTH 4 DAY 12 YEAR 1996 and/or

last date of exposure MONTH 2 DAY 28 YEAR 1996.

3. Give date of injury or onset of disease MONTH 2 DAY 28 YEAR 1996.

4. How did the injury or disease happen? Company knew claimed shipment was loaded I was unknowingly exposed to asbestos and the company never gave me any warning or protective equipment. More information enclosed

5. Did injury or disease occur on employer's premises? Yes X No Where? (Be specific.)

I was injured on a Conway truck off Conway property

6. Notice of your injury or disease was served on your employer on MONTH 2 DAY 29 YEAR 1996 in the following manner:

7. What was your job title at the time of injury or disease?

Driver salesman

362 1197-1

LIBC-362 REV 11-97 (OVER)

51a

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501
(TOLL FREE) 800-482-2383

CLAIM PETITION FOR WORKERS' COMPENSATION

EMPLOYEE SOCIAL SECURITY NUMBER: 192-28-2964

DATE OF INJURY: 2 / 28 / 1996 (MONTH / DAY / YEAR)

PA BWC CLAIM NUMBER (IF KNOWN):

EMPLOYEE

First Name: STEVEN
Last Name: SMITH
If Deceased - Dependent or Guardian
First Name:
Last Name:
Address: 843 LINDENWOOD DR
Address:
City/Town: PITTSBURGH State: PA Zip: 15234
County: ALLEGHENY
Telephone: 412 343-7454

EMPLOYER

Name: Consolidated Freightways
Address:
Address:
City/Town: State: Zip:
County:
Telephone: FEIN:

VS.

INSURER or THIRD PARTY ADMINISTRATOR (if self insured)

Name: Consolidated Freightways
Address:
Address:
City/Town: State: Zip:
Telephone: Bureau Code:
County:
Claim #: FEIN:

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1. Complete description of injury or illness including all parts of body affected.

I injured my mucous membrane when I was unknowingly exposed to bacteria

Loss or loss of use of arm, hand, finger, leg, foot or toe.

Disfigurement (scars) of head, face, or neck.

Additional compensation from the Second Injury Fund (due to existence of prior physical disability).

Loss of sight.

Loss of hearing.

15. Other I developed a bitter taste in my mouth & still have ordeal

16. Is there other pending litigation in this case? Yes X No If Yes, explain below:

PLEASE ENTER MY APPEARANCE FOR PETITIONER:

Attorney Name

PA Attorney ID Number

Firm Name

Address

Address

City/Town State Zip Code

Telephone ( )

Date of Petition

9 24 2010
MONTH DAY YEAR

A copy of this petition has been sent to the employer.

Steven Smith

Signature

X Employee Attorney

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NOTICE: This Petition must be filled out as fully as possible. The original must be sent to the Bureau of Workers' Compensation, 1171 South Cameron Street, Room 103, Harrisburg, PA 17104-2501. A copy must be sent by you to the employer. Information on the completion of this form may be obtained by calling the Bureau of Workers' Compensation Helpline at 800-482-2383.

362 1197-2

Any individual filing misleading or incomplete information knowingly and with intent to defraud is in violation of Section 1102 of the Pennsylvania Workers' Compensation Act and may also be subject to criminal and civil penalties through Pennsylvania Act 165.

LIBC-362 REV 11-97

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8. Were you working for more than one employer at the time of your injury? Yes ✓ No If Yes, list additional employers:

9. Did this problem cause you to stop working? ✓ Yes No If Yes, give date. MONTH 4 DAY 12 YEAR 1996

10. Are you back to work with the same employer? Yes ✓ No If Yes, Regular Job Other Job / Give title.

11. Are you working with another employer? Yes ✓ No If Yes, give name and address of new employer:

12. What were your wages at the time of injury? $ Hour Day or Week

13. If you have returned to work since your injury or illness, are you earning More Same Less than you were at the time of injury? Current earnings $ Hour Day or Week

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14. I am seeking payment for (check all that apply):

Loss of wages.

Partial disability from MONTH DAY YEAR to MONTH DAY YEAR

Full disability from MONTH DAY YEAR to MONTH DAY YEAR

✓ Medical bills (give name of doctor/hospital, address, type of treatment and bill in space below).

✓ Counsel fees to be paid by the employer.

was damaged loaded this illegal shipment without giving me any protective equipment and warning that is required by law. The management at Consolidated Freightways (CF) was told the shipment was damaged and management told the person who made management aware of the condition of the shipment to load the shipment.

My injuries could have been prevented but the management of CF ignored all government regulations pertaining to the transporting and handling of hazardous material (HM). When the shipment of HM was received at the Pittsburgh terminal, the company was required by law to put the damaged shipment into a recovery container and make sure the paper work was with the shipment. Instead of following government regulations, the management ignored the government regulations and treated the shipment as a normal shipment.

The fact that I had to touch this shipment without any warning and protection, I was injured.

CF filed false reports to cover up their violation of government regulations on how I was injured and withheld information I needed for treatment and refused to treat me. CF is a dishonest company that lied and I want new hearing.

Yours truly,
Steven Smith
412-343-7454

Steven Smith

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Typed Transcript of Statement Handwritten and Mailed With Petition of Steven Smith dated 9-24-01 And Referred To In #4 On The Face of the Petition

4. Company knew damaged shipment was loaded. I was unknowingly exposed to poison and the company never gave me any warning or protective equipment.
More information enclosed.

(Steve Smith attached a two page handwritten statement referring to #4. on his petition).

Text of Steven Smith's Attached Statement

Consolidated Freightway's dishonesty gave them the advantage and they controlled the agenda with their lies. I never had a heart attack as they claimed. Continuation of part 4.

I developed a bitter taste in my mouth from the exposure and hurt my mucous membrane.

I was injured in the course of my employment and in furtherance of company business on 2-28-96 when I secured a damaged shipment of hazardous material and prevented a dangerous situation from becoming worse and injuring the citizens of Pennsylvania. I was not aware of the damaged and open cans of hazardous material when I picked up the carton.

Consolidated Freightways knowingly and willfully with the knowledge that the shipment [illegible] loaded this illegal shipment without giving me any protective equipment

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... my negligence would have
I picked up the Carton.

Consolidated Freightways knowingly and willfully with the knowledge that the shipment was damaged loaded this illegal shipment without wearing fire and protective equipment and wearing that is required by law. The management at Consolidated Freightways was told the shipment was damaged and management told the person who made management aware of the condition of the shipment to load the shipment.

My injuries could have been prevented but the management at Consolidated Freightways ignored all government regulations relating to the transporting and handling of Hazardous materials. When the shipment of hazardous

47

Concealed threatening dishonesty gave them the advantage. and then Combated the agenda with there lies. I never had a heart attack as they claimed

Continued / Part 4/

I developed a bubble hasta in my mouth from the exposure and hurt my mucous membrane.

I was injured in the Course of my employment and in furtherance of Company business on 2-28-96 when I secured a damaged shipment of hazardous material and prevented a dangerous situation from becoming worse and injuring the Citizens of Pennsylvania! I was not aware of the damaged

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Consolidated Freightways is a declining Company that needs and deserves new leaders.

Yours truly,

Steven Smith

412-343-7455

Steven Smith
848 Lindenwood Dr.
Pittsburgh, PA 15234

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54a

materials was received at the Pittsburgh terminal the company was required by law to seal the damaged shipment into a recovery container and make sure the proper words was with the shipment. instead of following government regulation the management ignored the government regulation and treated this shipment as a normal shipment.

the fact that I had to touch this shipment without any warning and protection I was injured.

Concealed filed false reports to cover up these violation of government regulation on how I was injured and with false information I needed for treatment and refused to treat me.

TO YOUR HONORABLE JUDGE:

In answer to the captioned claim, the Defendant respectfully pleads as follows: (Answers must be identified by numerical order in direct response to corresponding numbered allegations on claim petition.)

1. Denied. Proof demanded.

2. Denied. Claimant sustained a compensable work-related injury or occupational disease on or about April 12, 1996 or February 28, 1996. Proof demanded.

3. Denied. It is specifically denied that Claimant sustained a compensable injury or disease on or about April 28, 1996. Proof demanded.

4. Denied. It is denied Claimant sustained a compensable work-related injury by inhaling poison from a legal shipment of toxic material without any warning or protective equipment. Proof demanded.

5. Denied. It is denied that Claimant sustained a work-related injury while operating the Employer's trailer. Proof demanded.

6. Denied. It is specifically denied that Claimant provided notice of a compensable work-related injury to the Employer.

Continued on a Separate Page

NOTICE: This answer should be clearly completed (preferably typed) and original mailed directly to the office of the Judge to whom the case is assigned. Answers must be filed within 20 days. Every fact alleged in the claim petition not specifically denied by this answer shall be deemed to be admitted.

(OVER)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501
(TOLL FREE) 800-482-2383

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKERS' COMPENSATION ACT

Social Security Number: 192 - 28 - 2964

Date of Injury: 02 / 29 / 1996 (MM / DD / YYYY)

PA BWC Claim Number: 658011 (IF KNOWN)

Employee

First Name: Steven
Last Name: Smith
Street 1: 843 Lindenwood Drive
Street 2:
City/Town: Pittsburgh
State: PA
Zip Code: 15234 - 0000
County: Allegheny
Telephone: (412) 343 - 7454

Employer

Name: Consolidated Freightways
Street 1: 73 McCandless Road
Street 2:
City/Town: Pittsburgh
State: PA
Zip Code: 15201 -
County: Allegheny
Telephone: ( ) -
FEIN:

VS.

Insurer or Third Party Administrator (if self-insured)

Name: Constitution State Services Company
Street 1: 1105 Berkshire Boulevard
Street 2:
City/Town: Wyomissing
State: PA
Zip Code: 19610 -
Telephone: ( ) -
Bureau Code:
County:
Claim Number:
FEIN:

Steven Smith

Claimant,

V.

Consolidated Freightways

Defendant.

S.S. No. 192 28 2964

Date of Injury: 02/29/1996

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKERS' COMPENSATION ACT - Cont.

Defendant's Plea

Proof demanded.

7. Admitted.

8. Admitted.

9. Denied. Answering Defendant specifically denies Claimant sustained a compensable disability or loss of earnings as a result of the alleged injury on April 12, 1996 or anytime thereafter. Proof demanded.

10. Admitted.

11. Denied. Answering Defendant is without sufficient information to admit or deny whether Claimant is employed with a new Employer. Proof demanded.

12. Denied. Statement of Wages will be provided.

13. Denied.

14. Admitted in part. Denied in part. It is admitted Claimant is seeking relief including full disability from April 12, 1996 continuing, medical bills, counsel fees. Answering Defendant specifically denies Claimant is entitled to the requested relief. Proof demanded.

15. Denied. Proof demanded.

16. Admitted. This is the third Claim Petition Claimant has filed for the same injury including the same date of injury and same mechanism of injury. Claimant is seeking the same relief. Claimant has filed two Appeals through Workers' Compensation Appeal Board; one Appeal to the Commonwealth Court and has currently filed a Petition for Allowance of Appeal before the Pennsylvania Supreme Court.

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WHEREFORE, the Defendant requests that the claim petition be dismissed or in the alternative disallowed.

Defendant

First Name: Stephen R. Last Name: Harris, Esquire

Signature:

Date: 10 / 22 / 2004 (MM / DD / YYYY)

Attorney

Signature: Stephen R. Harris

Date: 10 / 22 / 2004 (MM / DD / YYYY)

PLEASE ENTER MY APPEARANCE FOR DEFENDANT:
Attorney

First Name: Stephen R. Last Name: Harris

Firm Name: FARRELL & RICCI, P.C.

Street 1: 4423 North Front Street

Street 2:

City/Town: Harrisburg State: PA Zip Code: 17110 -

Telephone: (717) 230 - 9201 PA Attorney ID Number: 85804

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Any individual filing misleading or incomplete information knowingly and with intent to defraud is in violation of Section 1102 of the Pennsylvania Workers' Compensation Act and may also be subject to criminal and civil penalties through Pennsylvania Act 165 of 1994.

As a matter of further defense, the Defendant states the following:

1. Claimant has failed to state a claim upon which relief can be granted.

2. The Claim Petition is barred. as untimely, pursuant to Section 315, which requires that a claim be filed within three years from the date of injury.

3. The current Claim Petition is barred the doctrines of res judicata and collateral estoppel because Claimant has filed two previous Petitions alleging the same date of injury, same mechanism of injury, and requesting the same relief. Those Petitions were previously litigated and the parties received final determination, in which it was found that Claimant did not sustain his burden of proof on the Claim Petition.

4. Answering Defendant hereby requests the imposition of reasonable attorney's fees and costs against Claimant and Claimant's attorney for filing a third frivolous claim. See Patel v. WCAB(Saquoit Fibers Company), 520 A.2d 525 (Pa. Cmwlth. 1987).

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general unsecured claim.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. SECURED CLAIM

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief description of collateral:

☐ Real Estate

☐ Motor Vehicle

☐ Other_____

Value of collateral: $[ ]

Amount of arrearage and other charges at time case filed included in secured claim above, if any:

$[ ]

6. UNSECURED PRIORITY CLAIM

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority: $[ ]

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,650), earned within 90 days before filing of the bankruptcy petition or cessation of the Debtor's business, whichever is earlier - 11 U.S.C.§ 507(a)(3)

☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4)

☐ Up to $2,100 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)

☐ Alimony, maintenance or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7)

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8)

☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)_____

**Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

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7. CREDITS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim claimant has deducted all amounts that claimant owes to the debtor.

8. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. DATE-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and an additional copy of this proof of claim.

THE ORIGINAL OF THIS COMPLETED PROOF OF CLAIM (PLUS ONE COPY OF THE SAME) MUST BE SENT BY MAIL OR HAND DELIVERY SO THAT IT IS ACTUALLY RECEIVED ON OR BEFORE 4:00 P.M. PREVAILING PACIFIC TIME ON FEBRUARY 7, 2003.

THIS SPACE FOR COURT USE ONLY

BY MAIL TO:

CONSOLIDATED FREIGHTWAYS
C/O POORMAN-DOUGLAS CORPORATION
P.O. BOX 872
RIVERSIDE, CA 92502

BY HAND OR OVERNIGHT DELIVERY TO:

CONSOLIDATED FREIGHTWAYS
OFFICE OF THE CLERK
U.S. BANKRUPTCY COURT
3420 TWELFTH STREET
RIVERSIDE, CA 92501

DATE SIGNED:	**SIGN** and print the name and title, if any, of the creditor or other person authorized to file this claim (attach power of attorney, if any).

F9451

Penalty for presenting fraudulent claim is a fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 AND 3571.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

PROOF OF CLAIM

Debtor Name:
CONSOLIDATED FREIGHTWAYS
CORPORATION OF DELAWARE

Case Number:
02-24284-MG

YOUR CLAIM IS SCHEDULED AS:

UNSECURED NON-PRIORITY
$0.00
CONTINGENT
UNLIQUIDATED
DISPUTED

SCH#1872 V#8133131117-000

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor and Address:

0224284 195981 J03027B12 S#0028146
ST SMITH
843 LINDENWOOD DR
PITTSBURG, PA 15234

Creditor Telephone Number ( ) -

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if this address differs from the address on the envelope sent to you by the court.

If there is an amount shown, you have a claim scheduled as shown.
If you agree with the amount scheduled by the Debtor and have no other claim against the Debtor, you do not need to file this proof of claim except as stated below.

If the amount is shown as disputed, unliquidated or contingent, a proof of claim should be filed. If you have already filed a proof of claim with the Bankruptcy Court you need not file again.

CREDITOR TAX I.D. #:

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces or ☐ amends a previously filed claim dated: (mm/dd/yy)

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (describe briefly)
☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (Fill out below)

Your social security number - -

Unpaid compensation for services performed from (mm/yy) to (mm/yy)

2. DATE DEBT WAS INCURRED: mm/dd/yyyy

3. IF COURT JUDGMENT, DATE OBTAINED: mm/dd/yy

4. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $, , .

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below; otherwise your claim will be deemed a

Cf Airfreight Corporation, that resulted from or related to the Debtors' delivery of freight ("Freight Delivery"), including, without limitation, Claims based upon damages to cargo being delivered, delays in delivery, merchandise not delivered or delivered in insufficient amounts or other problems with delivery, including freight picked up by the customer short of the destination point which arose during the period **from the Petition Date through (and including) October 31, 2002**, to file a written proof of such Claim with the Court and the Debtors that substantially conforms to the form attached to this notice or is otherwise in conformity with Official Form No. 10 (which is available on the Court's website, www.cacb.uscourts.gov) by sending an original proof of claim and one photocopy to:

(if by U.S. mail)
Consolidated Freightways
Poorman-Douglas Corporation
P.O. Box 872
Riverside, CA 92502

or

(if by hand delivery or overnight mail)
Consolidated Freightways
Office of the Clerk
U.S. Bankruptcy Court
3420 Twelfth Street
Riverside, CA 92501

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on or before 4:00 p.m. (Prevailing Pacific Time) on February 7, 2003 (the "Bar Date"). Such proofs of Claim shall only be deemed timely filed if they are actually received by the Court on or before the Bar Date.

AS USED HEREIN, THE TERM "CLAIM" MEANS (A) RIGHT TO PAYMENT, WHETHER OR NOT SUCH RIGHT IS REDUCED TO JUDGMENT, LIQUIDATED, UNLIQUIDATED, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, LEGAL, EQUITABLE, SECURED OR UNSECURED; OR, (B) RIGHT TO AN EQUITABLE REMEDY FOR BREACH OF PERFORMANCE IF SUCH BREACH GIVES RISE TO A RIGHT TO PAYMENT, WHETHER OR NOT SUCH RIGHT TO AN EQUITABLE REMEDY IS REDUCED TO JUDGMENT, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, SECURED OR UNSECURED.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, et al., Debtors. Fed. Tax I.D. No. 94-1444797	Case No.: RS 02-24284 MG Chapter 11 (Jointly Administered with Case Nos. RS 02-24287 MG, RS 02-24289 MG, RS 02-24293 MG, RS 02-24294 MG and RS 02-24295 MG) Judge: Hon. Mitchel R. Goldberg

NOTICE OF BAR DATE REQUIRING FILING OF PROOFS OF CLAIM AGAINST DEBTORS ON OR BEFORE FEBRUARY 7, 2003 AT 4:00 P.M. (PACIFIC TIME)

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TO ALL PERSONS AND ENTITIES WITH POTENTIAL CLAIMS AGAINST THE FOLLOWING DEBTORS:

Consolidated Freightways Corporation of Delaware, Case No. RS 02-24284 MG
Consolidated Freightways Corporation, Case No. RS 02-24289 MG
CF Airfreight Corporation, Case No. RS 02-24287 MG
CF MovesU.com Incorporated, Case No. RS 02-24293 MG
Leland James Service Corporation, Case No. RS 02-24294 MG
Redwood Systems, Inc., Case No. RS 02-24295 MG

PLEASE TAKE NOTICE that on October 29, 2002, the United States Bankruptcy Court for the Central District of California, Riverside Division (the "Court") entered an order (the "Bar Date Order") in the above-captioned chapter 11 cases (the "Cases") requiring all persons and entities, EXCEPT AS INDICATED BELOW, that assert (i) a Claim (as defined below) against the entities listed above (collectively, the "Debtors") which arose prior to **September 3, 2002** (the "Petition Date") or (ii) a Claim against the Debtors, other than

Latham & Watkins 633 West Fifth St., Suite 4000 Los Angeles, CA 90071	Claimant Services 877-647-5873

Meeting of Creditors

Date:	**January 16, 2003 at 10:00 a.m.**	**Location:**	**Riverside Marriott Grand Ballroom 3400 Market Street Riverside, California 90071**

Deadline to File a Proof of Claim

February 7, 2003

Creditors May Not Take Certain Actions

The filing of the bankruptcy cases automatically stays certain collection and other actions against the debtors and the debtors' property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: U.S. Bankruptcy Court 3420 Twelfth Street Riverside, CA 92501 Telephone number: (909) 774-1000	**For the Court:** Clerk of the Bankruptcy Court Jon D. Ceretto Date: December 9. 2002
Hours Open: 9:00 am - 4:00 pm	

Form F9631

UNITED STATES BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA

Notice of Chapter 11 Bankruptcy Cases, Meeting of Creditors and Deadlines

Chapter 11 bankruptcy cases concerning the debtor corporations listed below were filed on September 3, 2002.

You may be a creditor of one or more of the debtors or if you are a lawfirm, you represent an entity that may be a creditor of one or more of the debtors. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in these cases may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: the staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor (name(s) and address):	Case Number:	Taxpayer ID Nos.:
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE Address: 11888 Mission Blvd., Mira Loma, CA 91752	Case: 02-24284-MG	Tax ID: 94-1444797
CONSOLIDATED FREIGHTWAYS CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24289-MG	Tax ID: 77-0425334
REDWOOD SYSTEMS, INC. Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24295-MG	Tax ID: 94-3262817
LELAND JAMES SERVICE CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24294-MG	Tax ID: 77-0381974
CF AIRFREIGHT CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24287-MG	Tax ID: 93-1294381
CF MOVESU.COM INC. Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24293-MG	Tax ID: 91-2173020

Attorney for Debtors (name and address):	Telephone Number:
Michael S. Lurey, Esq. Latham & Watkins	Consolidated Freightways Claimant Services

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general unsecured claim.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. SECURED CLAIM

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief description of collateral:

☐ Real Estate

☐ Motor Vehicle

☐ Other_____

Value of collateral: $[ ][ ][ ],[ ][ ][ ][ ].[ ][ ]

Amount of arrearage and other charges at time case filed included in secured claim above, if any:

$[ ][ ][ ],[ ][ ][ ][ ].[ ][ ]

6. UNSECURED PRIORITY CLAIM

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority: $[ ][ ][ ],[ ][ ][ ][ ].[ ][ ]

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,650), earned within 90 days before filing of the bankruptcy petition or cessation of the Debtor's business, whichever is earlier - 11 U.S.C.§ 507(a)(3)

☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4)

☐ Up to $2,100 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)

☐ Alimony, maintenance or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7)

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8)

☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)_____

** Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

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7. CREDITS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim claimant has deducted all amounts that claimant owes to the debtor.

8. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. DATE-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and an additional copy of this proof of claim.

THE ORIGINAL OF THIS COMPLETED PROOF OF CLAIM (PLUS ONE COPY OF THE SAME) MUST BE SENT BY MAIL OR HAND DELIVERY SO THAT IT IS ACTUALLY RECEIVED ON OR BEFORE 4:00 P.M. PREVAILING PACIFIC TIME ON FEBRUARY 7, 2003.

THIS SPACE FOR COURT USE ONLY

BY MAIL TO:
CONSOLIDATED FREIGHTWAYS
C/O POORMAN-DOUGLAS CORPORATION
P.O. BOX 872
RIVERSIDE, CA 92502

BY HAND OR OVERNIGHT DELIVERY TO:
CONSOLIDATED FREIGHTWAYS
OFFICE OF THE CLERK
U.S. BANKRUPTCY COURT
3420 TWELFTH STREET
RIVERSIDE, CA 92501

NED:

SIGN and print the name and title, if any, of the creditor or other person authorized to file this claim (attach power of attorney, if any).

resenting fraudulent claim is a fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 AND 3571

F9451

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

PROOF OF CLAIM

Debtor Name:
CONSOLIDATED FREIGHTWAYS
CORPORATION OF DELAWARE

Case Number:
02-24284-MG

YOUR CLAIM IS SCHEDULED AS:

UNSECURED NON-PRIORITY
$0.00
CONTINGENT
UNLIQUIDATED
DISPUTED

SCH#1872 V#8133131117-000

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor and Address:

0224284 195981 J03027B12 S#0028146
ST SMITH
843 LINDENWOOD DR
PITTSBURG, PA 15234

Creditor Telephone Number ( ) -

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if this address differs from the address on the envelope sent to you by the court.

If there is an amount shown, you have a claim scheduled as shown.
If you agree with the amount scheduled by the Debtor and have no other claim against the Debtor, you do not need to file this proof of claim except as stated below.

If the amount is shown as disputed, unliquidated or contingent, a proof of claim should be filed. If you have already filed a proof of claim with the Bankruptcy Court you need not file again.

CREDITOR TAX I.D. #:

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces or ☐ amends a previously filed claim dated: (mm/dd/yy)

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (describe briefly)
☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (Fill out below)

Your social security number - -

Unpaid compensation for services performed from (mm/yy) to (mm/yy)

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2. DATE DEBT WAS INCURRED: mm/dd/yyyy

3. IF COURT JUDGMENT, DATE OBTAINED: mm/dd/yy

4. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $, , , .

If all or part of your claim is secured or entitled to priority, also complete item 5 or 6 below; otherwise your claim will be deemed a general unsecured claim.

CF AirFreight Corporation, that resulted from or related to the Debtors' delivery of freight ("Freight Delivery"), including, without limitation, Claims based upon damages to cargo being delivered, delays in delivery, merchandise not delivered or delivered in insufficient amounts or other problems with delivery, including freight picked up by the customer short of the destination point which arose during the period **from the Petition Date through (and including) October 31, 2002**, to file a written proof of such Claim with the Court and the Debtors that substantially conforms to the form attached to this notice or is otherwise in conformity with Official Form No. 10 (which is available on the Court's website, www.cacb.uscourts.gov) by sending an original proof of claim and one photocopy to:

(if by U.S. mail)
Consolidated Freightways
Poorman-Douglas Corporation
P.O. Box 872
Riverside, CA 92502

or

(if by hand delivery or overnight mail)
Consolidated Freightways
Office of the Clerk
U.S. Bankruptcy Court
3420 Twelfth Street
Riverside, CA 92501

on or before 4:00 p.m. (Prevailing Pacific Time) on February 7, 2003 (the "Bar Date"). Such proofs of Claim shall only be deemed timely filed if they are actually received by the Court on or before the Bar Date.

AS USED HEREIN, THE TERM "CLAIM" MEANS (A) RIGHT TO PAYMENT, WHETHER OR NOT SUCH RIGHT IS REDUCED TO JUDGMENT, LIQUIDATED, UNLIQUIDATED, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, LEGAL, EQUITABLE, SECURED OR UNSECURED; OR, (B) RIGHT TO AN EQUITABLE REMEDY FOR BREACH OF PERFORMANCE IF SUCH BREACH GIVES RISE TO A RIGHT TO PAYMENT, WHETHER OR NOT SUCH RIGHT TO AN EQUITABLE REMEDY IS REDUCED TO JUDGMENT, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, SECURED OR UNSECURED.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re	Case No.: RS 02-24284 MG
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, et al.,	Chapter 11
Debtors.	(Jointly Administered with Case Nos. RS 02-24287 MG, RS 02-24289 MG, RS 02-24293 MG, RS 02-24294 MG and RS 02-24295 MG)
Fed. Tax I.D. No. 94-1444797	Judge: Hon. Mitchel R. Goldberg

NOTICE OF BAR DATE REQUIRING FILING OF PROOFS OF CLAIM AGAINST DEBTORS ON OR BEFORE FEBRUARY 7, 2003 AT 4:00 P.M. (PACIFIC TIME)

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TO ALL PERSONS AND ENTITIES WITH POTENTIAL CLAIMS AGAINST THE FOLLOWING DEBTORS:

Consolidated Freightways Corporation of Delaware, Case No. RS 02-24284 MG
Consolidated Freightways Corporation, Case No. RS 02-24289 MG
CF Airfreight Corporation, Case No. RS 02-24287 MG
CF MovesU.com Incorporated, Case No. RS 02-24293 MG
Leland James Service Corporation, Case No. RS 02-24294 MG
Redwood Systems, Inc., Case No. RS 02-24295 MG

PLEASE TAKE NOTICE that on October 29, 2002, the United States Bankruptcy Court for the Central District of California, Riverside Division (the "Court") entered an order (the "Bar Date Order") in the above-captioned chapter 11 cases (the "Cases") requiring all persons and entities, EXCEPT AS INDICATED BELOW, that assert (i) a Claim (as defined below) against the entities listed above (collectively, the "Debtors") which arose prior to **September 3, 2002** (the "Petition Date") or (ii) a Claim against the Debtors, other than

Latham & Watkins 633 West Fifth St., Suite 4000 Los Angeles, CA 90071	Claimant Services 877-647-5873

Meeting of Creditors

Date:	**January 16, 2003 at 10:00 a.m.**	**Location:**	**Riverside Marriott Grand Ballroom 3400 Market Street Riverside, California 90071**

Deadline to File a Proof of Claim

February 7, 2003

Creditors May Not Take Certain Actions

The filing of the bankruptcy cases automatically stays certain collection and other actions against the debtors and the debtors' property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: U.S. Bankruptcy Court 3420 Twelfth Street Riverside, CA 92501 Telephone number: (909) 774-1000	For the Court: Clerk of the Bankruptcy Court Jon D. Ceretto Date: December 9. 2002
Hours Open: 9:00 am - 4:00 pm	

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UNITED STATES BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA

Notice of Chapter 11 Bankruptcy Cases, Meeting of Creditors and Deadlines

Chapter 11 bankruptcy cases concerning the debtor corporations listed below were filed on September 3, 2002.

You may be a creditor of one or more of the debtors or if you are a lawfirm, you represent an entity that may be a creditor of one or more of the debtors. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in these cases may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: the staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor (name(s) and address):	Case Number:	Taxpayer ID Nos.:
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE Address: 11888 Mission Blvd., Mira Loma, CA 91752	Case: 02-24284-MG	Tax ID: 94-1444797
CONSOLIDATED FREIGHTWAYS CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24289-MG	Tax ID: 77-0425334
REDWOOD SYSTEMS, INC. Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24295-MG	Tax ID: 94-3262817
LELAND JAMES SERVICE CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24294-MG	Tax ID: 77-0381974
CF AIRFREIGHT CORPORATION Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24287-MG	Tax ID: 93-1294381
CF MOVESU.COM INC. Address: 16400 SE CF Way, Vancouver, WA 98683	Case: 02-24293-MG	Tax ID: 91-2173020
Attorney for Debtors (name and address):	**Telephone Number:**	
Michael S. Lurey, Esq. Latham & Watkins	Consolidated Freightways	

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Power?

A. Yes.

Q. And those were the same boxes that the bathtub was on top of?

A. No. The poison was to O.C. Clauss. It was loaded in front, --- there was another shipment, --- I had a shipment for Clauss Lumber, C & C Lumber, West Penn Power, R.E. Michaels. I don't know where the other stops went. Those are the four stops that were within the presence of me.

Q. Let me back up here. First you unloaded a bathtub ---

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JUDGE VALLELY:

I understand that. We're getting off the track here. Mr. Ludin, why don't you ask him some specific questions.

BY ATTORNEY LUDIN:

Q. On this particular day, you said you had a bill that had some hazardous products ---.

JUDGE VALLELY:

Just relax. We have plenty of time.

BY ATTORNEY LUDIN:

Q. Were there hazardous products contained in the boxes that you were delivering to West Penn

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Q. Spell his last name?

A. I don't know. I don't know, I call him Frank. His last name begins with a B.

Q. What did you do with your cartons that were on your truck? Deliver them or did you leave them there?

A. No. The one carton sitting on the floor, and the other two cartons still sitting on the pallet was on top of six furnaces for R.E. Michaels. There was like three furnaces this way (indicating), three that way (indicating), and

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A. I felt like a rush went down my throat. It felt like it was burning. I just couldn't believe it, you know. And I just couldn't --- even though I was leaving the carton, I ran out of the trailer.

Q. After you ran out of the trailer, what did you do?

A. I was there talking to somebody, and I said I better call management. I said to the guy --- they should not have been loaded on the truck, it looks like poison. At that point, I called up the terminal.

Q. Who did you talk to at the terminal?

A. Frank Bazacheck (phonetic).

pulled to door shut. And I pulled away from ---
dock and was sitting on the other side.
Q. You pulled your truck away from the dock?
A. Yes, I did.
Q. Did you sit in the cab or did you get out of the truck?
A. I went back and I sat ---.
Q. Let me finish my question. Did you sit in the truck or did you get out?
A. I got out of the cab.
Q. Where did you go?
A. I went back to the receiving office at West

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22a

there was a pallet on top of them. So I called up Frank Bazacheck and I told him that I thought I came across something poisonous on the trailer. And I asked him what I should do.

Q. What did he tell you?

A. He said, just stand by, and I'll call you back.

Q. Did he?

A. Yes, he did. But in the meantime, West Penn Power only has one little shipping dock. They only have one dock in the morning. So the tow motor operator from West Penn Power, he took the pallet down and set it down on the floor. And I [illegible] away from the

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A. I felt a little bit nauseous.

Q. Nauseous.

A. And light headed.

Q. Did somebody from your company ultimately come or did Frank send somebody?

A. Mr. Bazacheck called me back.

Q. What did he tell you?

A. He told me to secure the poison and bring it back to the terminal.

Q. Did you do that?

A. Yes, I did.

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23a

Penn Power waiting for Mr. Bazacheck's call. I wasn't feeling too good, but I figured --- these people have these books down there at West Penn Power. And they said fresh air for poison. Fresh air would be good.

Q. Besides the sensation in your throat, did you have any other --- when you breathed this material?

A. I just --- like I said it hit me. And I was like I didn't feel right. And I just left the trailer. And like I said, I went back and ---.

Q. Just answer my question. Besides the burning sensation in your throat, were you experiencing any other symptoms?

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Q. You have been seen by a number of other physicians some of whom we have not mentioned. Are you currently treating?

A. Yes, I am.

Q. As a result of this poison leaking, was there a citation issued by OSHA or anyone else ---?

ATTORNEY COTTONE:

I object to the form of that question.

JUDGE VALLELY:

What's the objection?

ATTORNEY COTTONE:

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24a -

I didn't eat that much. And I was laying in bed and I started to regurgitate.

Q. You didn't consult a doctor then?

A. No, I didn't. I come to work the next day. I turned in a --- I filled out a report. I said I wasn't feeling good. Maybe the fresh air would pass it.

Q. Once you saw this physician at St. Francis you said ---

A. Correct.

Q. --- on April 12th, you have not return to work; is that correct?

A. No, I haven't.

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who you have been treated by, who were the physicians that have seen you in addition to the initial doctor that the company sent you to at St. Francis?

A. I went back Monday to a Dr. Fortunato.

Q. Dr. Fortunato is located where?

A. Saint Francis HAPPI Program.

Q. Have you also been seen by Dr. Nellhaus?

A. Nellhaus.

Q. He is a pulmonary specialist; is that correct?

A. Right.

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25a-

Poison leaking. I mean that is at a contention at this point.

ATTORNEY LUDIN:

I will strike the word poison.

BY ATTORNEY LUDIN:

Q. As a result of this incident that took place on your truck, was any citation issued?

A. OSHA, I called OSHA. And I took a copy of the bill I had that said it was damaged.

Q. With regard to your physical condition, and again we have medical records and I'll submit those. I don't want you to tell us anything that the doctor told you. I just want you to tell us

it burns and stings. And the first night that it happened, I had regurgitation. And I took Rolaids and Tums with Calcium, and it seemed to calm it down some. I have a sour taste and it's never left as far as eating something or --- coffee, it's bitter. If I put a toothpick in my mouth, it's bitter. And it just has never gone away. I'm being treated now with medication.

Q. What type of medication?

A. I have two different inhalers for asthma. And then he gave me a small pill that supposed to --- it makes me like mean and irritable and tired.

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Q. He's located at Mercy Hospital?
A. Correct.
Q. Who sent you to Dr. Nellhaus?
A. Dr. Frey.
Q. Is Dr. Norman Frey your family physician?
A. Yes, he is.
Q. Have you ever experienced shortness of breath or nausea of this type prior to February of 1996?
A. No, I haven't.
Q. Are those the only symptoms or are there other symptoms that you have experienced?
A. I've had a sour taste in my mouth since that. I can't drink a beer or alcoholic beverage because

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A. No, I haven't.

Q. Did you ever have shortness of breath before this?

A. No, I haven't.

Q. Are you a smoker?

A. No. I haven't smoke since 1968.

Q. What did Dr. Frey see you for prior to this incident?

A. I had problems with my rectum. Constipation and I had a rectum check or something. And Dr. Cassaly (phonetic) told me I had bad eating habits. I should try to eat at the same time

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So he reduced them, and I take two a day now. I don't know what the medication is called.

Q. Today is July 25th, so it's been over three months since you last worked. What is it that prevents you from performing your regular work as a truck driver/ salesperson?

A. The shortness of breath. And like, I'll be doing something strenuous, and I just get short of breath. I feel like I just can't perform my duties. And I take this medication that you can't drive with because it causes drowsiness.

Q. Have you ever take this medication before this?

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With that being said, before we conclude today, Your Honor, I'm not quite sure about his first defense. I don't anticipate having to bring in an expert to testify about this product, unless I'm instructed to. I mean, if I have submit the records showing that this was in fact the product on the truck, I will. I guess what I need is clarification. Is the Defendant indicating that this product was not on truck or that the chemical was not leaking?

ATTORNEY COTTONE:

We just received the file.

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JUDGE VALLELY:

Is the Defendant/Employer still denying that he was exposed to Trichloroethylene?

ATTORNEY COTTONE:

I think our defense is twofold, Your Honor. At this point, there are facts which show that it's inconclusive whether or not he was exposed to Trichloroethylene. I'm also asserting that in the alternative if he was exposed that could not cause his complaints or his disability.

JUDGE VALLELY:

All right.

ATTORNEY LUDIN:

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have identified it as hazardous materials as well as labeling of the drums.

* * * * * * * * *

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29 a

It's very early. There are some facts that have been relayed to me that there was an inspection of the packages that was done after the truck was returned to the terminal, that demonstrated that the packages were not damaged.

JUDGE VALLELY:

Then you two gentlemen talk about that, because obviously OSHA issued a citation.

ATTORNEY COTTONE:

Yes, Your Honor, I'd like to clarify for the record that the citation is not for the damaged product rather for a failure to

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as labeling of the drums.

* * * * * * * * *

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It's very early. There are some facts that have been relayed to me that there was an inspection of the packages that was done after the truck was returned to the terminal, that demonstrated that the packages were not damaged.

JUDGE VALLELY:

Then you two gentlemen talk about that, because obviously OSHA issued a citation.

ATTORNEY COTTONE:

Yes, Your Honor, I'd like to clarify for the record that the citation is not for the damaged product rather for a failure to have identified it as hazardous materials as well

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Before: Kathleen Vallely

Workers' Compensation Judge

Hearing: November 13, 1996

933 Penn Avenue

Fourth Floor

Pittsburgh, PA 15222

* * * * * * * * *

REPORTER: MARGARET K. CLARK

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EXHIBIT 23

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COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF LABOR AND INDUSTRY

BUREAU OF WORKERS' COMPENSATION

PITTSBURGH

* * * * * * * * * *

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STEVEN SMITH,	*	
Claimant	*	S.S. # 192-28-2964
	*	WCOD
VS.	*	
	*	
CONSOLIDATED FREIGHTWAYS,	*	
Employer	*	

* * * * * * * * * *

asked me initially about with his report, September 26th referred Doctor Nellhaus. Can I also at this time, you know, preserve my right to raise a hearsay objection if we go for greater than a year?

JUDGE VALLELY:

Yes. All right. But there's no hearsay objection to Claimant's Exhibit Six. And the parties may either --- it may be that this will turn out to be a claim for less than 52 weeks, in which case all reports are admissible. The other option is that even if it

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JUDGE VALLELY:

With his attached Curriculum Vitae is marked Defendant's Exhibit A.

JUDGE VALLELY:

Any objections?

ATTORNEY LUDIN:

Your Honor, I'll just note an objection on the basis of hearsay. Again, I'm not sure if we're going beyond the one-year period or not. If we're not, then I'll just withdraw the objection.

ATTORNEY COTTONE:

Your Honor, I know you had

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consultants. And is there any objection to that exhibit?

ATTORNEY LUDIN:

No, no objection to Doctor Nellhaus.

JUDGE VALLELY:

And Defendant's Exhibit B is admitted. Defendant's Exhibit C are medical records from Norman J. Frye.

ATTORNEY COTTONE:

For the record, Your Honor, the Claimant testified on Direct that he's still

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is a claim for more than 52 weeks, the parties may agree to waive their hearsay objections and agree to proceed on the reports.

ATTORNEY COTTONE:

Yes. I believe, Your Honor, that if this is going to be a claim for more than a 52-week period, we'll move forward with the medical testimony of, and present the medical testimony of Doctor Guzzardi.

JUDGE VALLELY:

All right. Defendant's Exhibit B are records from Kurt M. Nellhaus, N-E-L-L-H-A-U-S. I have critical care pulmonary

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HISTORY: This 59 year old white male was referred to me on May 28, 1996 by Dr. Norman Frey after a possible inhalation injury.

The patient apparently inhaled a vapor on a loading dock on February 28, 1996. Apparently he was moving some jacuzzi tubs and in the vicinity was a box of four open pails as he describes it and these pails apparently contained the chemical, trichloroethane. These containers were damaged and leaking. A Department of Labor OSHA inspection on March 19, 1996 revealed that three boxes of trichloroethane, one box which was damaged, came into contact to the patient and identified no OSHA violations.

After the patient's exposure, the patient had increased cough, especially at night some nausea and vomiting immediately after the exposure as well as shortness of breath. These symptoms with the exception of nausea and vomiting persisted until April 12, 1996, when he decided to see a physician at the emergency room of St. Francis Central Hospital. He was given proventil and Azmacort inhalers as well as Entex. Apparently, he developed confusion and irritability with the Entex and this was discontinued as well as the other medications. He initially felt that the inhalers made

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RITICAL CARE/PULMONARY CONSULTANTS
D. Building, Room 1070
01 Locust Street
:tsburgh, Pennsylvania 15219
is. Service 412/622-1133
fice Appt. 412/391-0347
ling 412/826-8079

RECEIVED
SEP 30 1996

ffrey M. Rothschild, M.D., F.C.C.P., F.C.C.M.
itical Care Consultant
rect Paging: 572-0000

Kurt M. Nellhaus, M.D., F.C.C.P.
Critical Care Consultant and Pulmonary Specialist
Direct Paging: 572-2222

September 24, 1996

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Gary Ludin
Attorney at Law
Suite 1302
Grant Building
Pittsburgh, PA 15219

RE: MEDICAL REVIEW
Steven Smith

My initial impression was that he may have had an airway injury secondary to trichloroethane exposure and I administered a short course of corticosteroids. He received a Medrol dosepack and this did not alleviate his symptoms. He continued to complain of a bitter taste in his mouth and dyspnea and cough. Subsequently, I performed an upper GI series was performed which revealed a hiatus hernia perhaps explaining some of his gastroesophageal symptoms. In addition, I performed a fiberoptic bronchoscopy on 6/19/96 to rule out significant anatomic inhalation injury. There were some minimal inflammatory changes and bronchial biopsies of the left lower lobe revealed a nonspecific chronic bronchitis. Cytology for malignant cells, acid-fast bacilli and cultures were negative. Post-bronchoscopy, I placed him on antibiotics.

The patient returned for follow up after being on the antibiotic and on a corticosteroid inhaler and his symptoms improved. I saw him again in follow on 7/16/96 and his improvement continued. Finally, I saw him in follow up on 9/16/96 and he has been essentially asymptomatic from that point on.

My impression has been and continues to be that this gentleman has reactive airway's dysfunction, possibly precipitated by trichloroethane.

RE: MEDICAL REVIEW
Steven Smith

him worse. He was given a follow up with Dr. Fortunato at the HAPPI Program at St. Francis Central Hospital. Apparently a cardiogram, cardiac stress test and a PFT were obtained. Subsequently, the patient was referred to Dr. Frey and then referred here to my office. His symptoms have continued, mainly to be shortness of breath, a bitter taste in his mouth when eating and a cough productive of whitish sputum. He has not had hemoptysis, visual or eye complaints, joint complaints, neurologic problems or skin complaints. While initially he denied heart burn, it became evident that this was a significant symptom on subsequent visits to my office.

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His past medical history includes herniorrhaphy in 1970 and hemorrhoidectomy in the 1960's. He had smoking in March, 1968, and had no recent travel other than to Mexico in January, 1996.

His physical examination on his first presentation revealed a 210 lb. man with stable vital signs in no apparent respiratory distress. His speech was somewhat pressured and anxious. His lungs were clear. The heart examination was normal and the extremities were unremarkable. There were no neurological deficits noted. A pulmonary function study was normal and gave no evidence of airway's obstruction. A diffusion capacity with not performed and finally his chest x-ray was completely normal.

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RE: MEDICAL REVIEW
Steven Smith

DISCUSSION: There is no authoritative reference to turn to define the pulmonary toxicity associated with trichloroethane. Case reports do exist but are rare. There has been a case of acute pneumonia associated with eosinophilic infiltration of the lung in one case report although this is not the presentation of this particular individual. (Ann Allergy 1993;71:338-9). A retrospective review of trichloroethane aerosol inhalation. (General Toxicology 1996;36:25-6) reported obstructive disease in several patients. I can say with a reasonable degree of medical certainty that the exposure of this chemical was temporally related to the onset of this patient's respiratory complaints. The exposure did subject the patient to a period of disability; I would not expect this disability to be permanent, however.

Sincerely,

Kurt M. Nellhaus, M.D.

KMN:lif

2)Medical Records

Records of Critical Care/Pulmonary Consultants
Records of Norman Frey
Records of Health Assistance Program
Records of St. Francis Medical Center
Records of University of Pittsburgh

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As you know, I have been an Emergency Physician for 20 years and during that time have participated in the care of approximately 200,000 patients. In addition, I am a board certified toxicologist and former chairman of the Toxicology Committee of the American College of Emergency Physicians. I have lectured nationally on topics related to toxicology. I have written both articles and textbook chapters on various subjects in toxicology. Relevant to this matter, I co- authored an article on toxic pulmonary problems related to the toxins produced in fires. This article, a copy of which is enclosed, reviews possible pulmonary problems to various chemicals. In addition, I have been

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LAWRENCE J. GUZZARDI, M.D., M.B.A.

Kevin Cottone, Esq.
Marshall, Farrell, Ricci, Smith & Haddick
1323 N. Front Street
Harrisburg, Pa. 17102

October 26, 1996

Re: Smith v. Consolidated Freightways

Dear Mr. Cottone,

Thank you for asking me to formulate an opinion in the above- referenced matter. In this regard, I have reviewed the following materials:

1)Workers' Compensation Records
- Employer's Report
- Statement of Injury
- Supervisor's Report
- Claim Petition

Two chlorinated hydrocarbons very closely related to trichloretnane were used for years in anesthesia. Chloroform and trichloretheylene, which differ only minimally from trichlorethane were routinely administered for many years until discontinued when even more favorable anesthetics became available. These anesthetic agents were delivered directly to the pulmonary bronchi! And they produced virtually no pulmonary problems and certainly not the type found in this case.

Had Mr. Smith suffered pulmonary injury secondary to trichlorethane exposure, there would have been objective evidence of such injury, either initially or at the time of the patient's pulmonary evaluation. Of course, no such medical evidence exists.

The patient's symptoms such as persistent bad taste, shortness of breath, cough and throat burning sensation, either collectively or individually, are much more likely to have resulted from esophageal reflux due to the patient's known hiatal hernia than from any pulmonary etiology. Again, these

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consulted on literally thousands of toxicology matters since becoming board-certified in 1980. **It is my belief, as both an experienced Emergency Physician and as a toxicologist, that the types of problems claimed by Mr. Smith are in no way linked to his transient trichloroethane exposure. I would generally regard such exposures as minor and highly unlikely to produce residual symptomatology.**

There is no scientific basis to a link between transient exposure trichlorethane and either chronic bronchitis or reactive airway disease. I have reviewed the literature available on trichloroethane and can find no studies establishing such a relationship. Since trichlorethane is relatively common, and since there are numerous reports of other medical problems associated with trichlorethane exposure, the absence of any literature on this point is powerful evidence that no such association, let alone causal relationship, exists for this type of exposure.

I am enclosing with this report information regarding trichloroethane toxicity. Please note in this exhaustive review, there is not one report of the type of pulmonary problems experienced by Mr. Smith. This is because no such association exists!

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symptoms do not fit any known sequelae of trichlorethane exposure and have never been reported in the scientific literature.

The patient apparently has evidence of a silent myocardial infarction. In the extensive literature available on trichloroethane and related compounds such as the anesthetics described above, there is no evidence that trichloroethane produces myocardial infarction. Arrythmias have been reported but are not relevant to this matter. The patient's myocardial infarction may well have been related to labile hypertension.

I am available to testify by telephonic deposition on November 13, 1996 if you so desire. All my conclusions have been reached with a reasonable degree of medical certainty.

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Sincerely,

Lan Guffard